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# **The International Law of Climate Change and Accountability**

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“[A] time may come (...) when the need for an effective international law is more obvious to more politicians in more nations than it is now. Climate change, for example, may provoke that shift in opinion. It would be a shame if lawyers and philosophers had not improved the jurisprudential discussion of international law before that day arrived.”<sup>1</sup>

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<sup>1</sup> Dworkin, 2013, 15.

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## Abstract

In the past few decades, accountability has become a key concept to assess the role and place of a wide range of transnational institutions. Such trend can be partially explained by the widespread sense of unaccountability that permeates the legal realm beyond the state.

The aim of this thesis is to investigate three particular institutional actors of the Climate Change Regime: the Intergovernmental Panel on Climate Change (IPCC), the Compliance Committee of the Kyoto Protocol (CCKP), and the Clean Development Mechanism (CDM). This investigation is carried out through the descriptive and critical lenses of accountability. It resorts to the Global Administrative Law (GAL) project in order to pursue that task.

Along the way, the thesis asks four interrelated research questions. The first is *conceptual*: what is accountability? The second is an abstract *normative* question: what is regarded as a desirable accountability relationship at the national and the global level? The third is *purely descriptive*: how accountable are the three institutions? The fourth, finally, is a *contextualised normative* question: how appropriate are their three accountability arrangements? The two former questions are instrumental and ancillary to the two latter. That is to say, they respectively provide the analytical and evaluative frameworks on the basis of which a concrete description and a concrete normative assessment will be done.



## Acronym List

COP	Conference of the Parties
COP/MOP	Conference of the Parties serving as the Meeting of the Parties to the Kyoto Protocol
FWCC	United Nations Framework Convention on Climate Change
MOP	Meeting of the Parties
GHG	Greenhouse Gases
UN	United Nations
UNEP	United Nations Environmental Programme
WMO	World Meteorological Organization

<b>IPCC</b>	<b>Intergovernmental Panel on Climate Change</b>
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AR4	Fourth Assessment Report
AR5	Fifth Assessment Report
FAR	First Assessment Report
IAC	InterAcademy Council
SAR	Second Assessment Report
SBSTA	Subsidiary Body for Scientific and Technological Advice
SPM	Summary for Policymakers
SYR	Synthesis Report
TAR	Third Assessment Report
TEAP	Technology and Economic Assessment Panel
TSU	Technical Support Unit
WG I	Working Group I
WG II	Working Group II
WG III	Working Group III

<b>CCKP</b>	<b>Compliance Committee of the Kyoto Protocol</b>
ERT	Expert Review Team

<b>CDM</b>	<b>Clean Development Mechanism</b>
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AF	Adaptation Fund
AFB	Adaptation Fund Board
CDM-AP	CDM Accreditation Panel
CDM-AT	CDM Assessment Teams
CER	Certified Emission Reductions
DOE	Designated Operational Entity
DNA	Designated National Authority
EB	Executive Board
GCF	Green Climate Fund
GEF	Global Environmental Facility
LDCF	Least Developed Countries Fund
PDD	Project Design Document
RIT	Registration and Issuance Team
SCCF	Special Climate Change Fund

### **Declaration**

I declare that the contents of this thesis have been composed by me and they have not been submitted for any other degree or professional qualification.

**Danielle Hanna Rached**

## Introduction

*“Lawyers should not cede the pursuit of good governance, enhanced accountability, or improved transparency to the politicians.”<sup>2</sup>*

### *The new journey of an old concept*

Accountability-talk is omnipresent in contemporary law and politics.<sup>3</sup> In spite of its rather high currency, though, accountability does not partake in the select group of first-order political ideals: democracy, human rights, constitutionalism and rule of law have all been historically uttered in much more vocal tones and still remain at the forefront of public demands for legitimate authority.<sup>4</sup> Accountability, in turn, has stayed at the backdoor of our legal or political vocabulary and operates at a lower waveband. It has not exactly been an incendiary enough flag to lead people to the streets, but it still incites reformist initiatives. It somewhat assists and qualifies each of those stand-alone ideals to pursue their respective ends.<sup>5</sup> Rather than radiating a comprehensive legal or political vision, accountability supplies a power-constraining toolbox that allows for a variety of permutations. Each permutation will hinge on the role, place and weight of the entity or actor to be held accountable.

This ability to serve various masters makes accountability all the more intriguing and chameleonic. To hold a powerful individual, a collectivity or an institution accountable is generally presumed to be a good thing. Accountability is announced, in other words, as a praiseworthy goal to be pursued by law and politics no matter where it takes place, be it locally or regionally, nationally or internationally. It would protect the account-holder and, in several ways, perhaps counter-intuitively,

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<sup>2</sup> Alvarez, 2006, 34.

<sup>3</sup> The literature on accountability is manifold. It ranges from political science to public administration, from administrative law to international law and international relations. A comprehensive sample of this extensive literature will come up along the dissertation. For an overview, see Mulgan (2003). As Mulgan himself has put it: “‘Accountability’ and ‘accountable’ are buzzwords of our era.” (2003, 1) Or Rubenstein: “accountability is often treated as a buzzword that is good in and of itself”. (2007, 620)

<sup>4</sup> Chapters 1 and 2 will address the ideological and institutional environments in which accountability discourses emerge.

<sup>5</sup> This “assistance” to more salient political ideals is already implied, for example, by the “French Declaration of the Rights of Man and Citizen” (1789), article 15: “Society has the *right to require* of every public agent *an account* of his administration.” (“La société a le *droit de demander compte* à tout agent public de son administration.”)

it may benefit the accountee as well. It may even rise above (or sit below) the public domain and permeate other sorts of power relation that cut across many spheres of social life, as we shall see.

This rather commonplace story, though, tells very little about the concrete configurations of accountability, the specific values and ends, if any, it is supposed to attain, let alone the exact settings in which it should apply or the functions it should fulfil. That resounding catchword, as it turns out, offers neither a straightforward definition nor a clear portrait of its own potential institutional translations. Therefore, it would be methodologically doubtful, if not futile, to start off any investigation about the accountability of specific international institutions of the Climate Change Regime without, first, cleaning up the haphazard rhetoric and, then, openly constructing a firmer conceptual foundation.<sup>6</sup>

The term is pregnant with conceptual meanings, rhetorical usages and ambivalent connotations, and has occasionally been uttered in a sloppy way as a “remedial slogan”.<sup>7</sup> It turns out, quite often, to be a vacuous container that carries whatever desirable institutional, procedural or personal qualities a powerful agent should possess. The reliability of the concept, in short, is “threatened by its popularity”.<sup>8</sup> All one can long for, thus, is to avoid the “free ride on the evocative powers”<sup>9</sup> of such a cunning word.

In the last few decades, we have witnessed a remarkable increase of calls for more accountability in the global arena. These calls were triggered by the perceived “challenge of unaccountability” that pervades the legal environment beyond the state.<sup>10</sup> Amid widespread institutional transformation and accretion, international law is being called upon to rethink its justificatory foundation. In such reflective exercise, accountability comes about as a chief category. The shift of the concept to the

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<sup>6</sup> See Stewart (2008), Kingsbury and Stewart (2008) and Mashaw (2006). The concern with clarity of this “appealing but elusive concept” (Bovens, 2007, 467) is overwhelmingly spread over the literature on accountability. Schedler echoes it: “accountability represents an underexplored concept whose meaning remains evasive, whose boundaries are fuzzy, and whose internal structure is confusing.” (1999, 13) That elusiveness, for example, is what made Dubnick (2002) draw the distinction between “accountability-the-word”, with all its rhetorical overtones, and “accountability-the-concept”.

<sup>7</sup> Stewart, 2008, 3

<sup>8</sup> Dubnick, 2002, 1.

<sup>9</sup> Bovens, 2010, 949

<sup>10</sup> Najam and Halle remark that “the challenge of unaccountability – and selective or partial accountability – is widespread in the international system”. They seek to devise the “few immediate steps that can begin recalibrating the Global Environmental Governance system towards a culture of accountability” (2010, 2)

transnational sphere, transcending the traditional domicile of domestic democratic politics, has materialised in a series of episodes of pressure to improve the accountability of most institutions of global governance.

Let me give two revealing examples of this current trend: one involves the core set of international institutions related to economic and financial policies; the other indicates how some non-governmental international organisations have been advocating the remodelling of the institutional *status quo* by way of accountability-enhancing measures.

The alleged accountability deficit of international financial institutions, such as the World Bank (WB) and the International Monetary Fund (IMF), has been added to the global agenda for more than 30 years. There are two main reasons for the widespread concern it has generated. First, member states are unevenly represented in the decision-making bodies of these institutions – the Boards of Directors. Only eight member-states are able to indicate their own Executive Director to the Board.<sup>11</sup> The remaining 181 states, organised in groups, can elect only a limited set of posts and hence complain against the different level of influence they can exercise on the decision-making.<sup>12</sup>

The second reason is that the scope of the activities of international financial institutions has expanded over the years. These institutions lend money for developmental purposes to lower and middle-income countries. The conditions for the approval of such loans have progressively escalated and require borrowing countries to adjust all sorts of internal policies (from economic regulation to judicial structures) in the name of good governance principles set up by the financial institutions. As a result, international financial institutions have a high leverage of interference with domestic actors without being, themselves, subject to the conventional web of accountability arrangements that domestic actors face.<sup>13</sup>

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<sup>11</sup> They are the five largest shareholders (Germany, UK, US, France, and Japan) together with Russian Federation, China and Saudi Arabia. See World Bank's website (Boards of Directors) and Woods, 2001, 85.

<sup>12</sup> Woods spots the problem: "This means that most national governments have only the weakest link to the formal deliberations and decision-making processes of the institutions." (2001, 85)

<sup>13</sup> As Bradlow claimed: "The net effect was that, de facto, the IFIs became important participants in the policy-making process of their member states." (2004-2005, 407) Woods goes the same way: "Both institutions are now engaging governments in negotiations which cover virtually all issues in economic policy-making – and beyond, with 'good governance' extending into areas such as the rule of law, judicial reform, corporate governance and so forth. This new, wide-ranging domain of advice and conditionality directly affects a broader swathe of policies, people, groups and organizations within countries." (2001, 89)

In the face of pressure, some measures were taken to improve the accountability of these institutions.<sup>14</sup> One of the most commented is the creation, in 1993, of the independent three-member Inspection Panel to probe the compliance of the World Bank with its internal policies and procedures.<sup>15</sup> Such panel is competent to receive requests for inspection by parties whose interests or rights have been or are likely to be affected by a project financed by the WB.<sup>16</sup> It came to be praised, thus, for giving voice to citizens of member-states. Moreover, both organisations have focused on increasing its level of transparency.<sup>17</sup> The WB, for example, has set up a “Policy on Access to Information”. Its rationale is entirely geared to an accountability discourse. Interestingly, the policy creates the right to appeal to whoever is denied access to information by the Bank.<sup>18</sup>

Created in 1995 as a substitute for the General Agreement on Trade and Tariff (GATT), the World Trade Organisation (WTO) has been repeatedly attacked on the accountability front. Behind the attacks is the fact that the international regulation on trade has gradually been converted from an agreement about the reduction of tariffs to a comprehensive system of rules that govern all sort of trade-related issues, in which typical domestic policies, such as food safety and agricultural subsidies, are also included.<sup>19</sup> Countries cannot just pick and choose to which agreement they want to commit themselves. It is rather on a ‘take it or leave it’ basis.<sup>20</sup>

Apart from being regarded as the source of intrusion on domestic arrangements by international law, the WTO has also given rise to a different, yet related, accountability-concern: the unequal power that developing countries have in comparison to developed ones to disproportionately influence decisions. Although the WTO formally adopts the rule of ‘one state, one vote’, the decisions, in reality, have allegedly been more dictated by the interests of developed countries. As Woods and Narlikar submitted, developed countries are the “decision-makers”, whereas the rest

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<sup>14</sup> Very little has been done to tackle the inequitable voting structure and composition of the Executive Board. See One World Trust, 2008, 17.

<sup>15</sup> The World Bank Inspection Panel was created by two Resolutions: Res. 93-10, from the International Bank for Reconstruction, and Res. 93-6, from the International Development Association.

<sup>16</sup> Resolutions 93-10 and 93-6, article 12.

<sup>17</sup> Woods, 2001, 90.

<sup>18</sup> World Bank, 2010, Policy on Access to Information, paragraphs 1 and 36.

<sup>19</sup> Esty, 2002, 12. Woods and Narlikar, 2001, 571.

<sup>20</sup> Woods and Narlikar contend: “the WTO was created on an all-or-nothing basis whereby countries had to commit to full membership in a “single undertaking”, binding themselves to a rule-based-system” (2001, 570)

of the countries are the “decision-takers”.<sup>21</sup> The already old story of accountability deficit, again, comes forth.

Similar examples abound. Let us see how three active organisations have approached the question. The first is the International Law Association (ILA). In 1996, it started to “consider what measures (legal, administrative or otherwise) should be adopted to ensure the accountability of public international organisations”.<sup>22</sup> The final report on the matter presented an extensive list of recommended rules and practices (RRPs), which, if adopted, should arguably render the operation of these international organisations more effective.<sup>23</sup> Just as an example, the first of its RRP addresses the importance of implementing the principle of good governance, which, among other measures, includes (i) turning the decision-making process more transparent, (ii) allowing for better forms of participation and access to information, and (iii) providing regular report and evaluation of its activities.<sup>24</sup> Accountability, as conceived by the ILA, is a means towards effectiveness.

The second example is the One World Trust, an independent think tank that has published several reports on the accountability of global governance. The reports intend to gauge the accountability of three global actors – international organisations, non-governmental organisations, and global corporations – so as to “to contribute to wider understanding and commitment to common principles of accountability”.<sup>25</sup> As the report argues, accountability is an important device to control the decisions taken by these actors, which, as a matter of fact, impact increasingly upon peoples’ lives.<sup>26</sup>

The reports conceptualise accountability as “the process through which an organisation sets a commitment to respond to and balance the needs of its diverse stakeholders in its decision making processes and activities, and delivers against this commitment.”<sup>27</sup> Based on such concept, the accountability of global organisations is appraised in accordance with four dimensions: transparency, participation, evaluations and complaints handling. Having assessed ninety institutions over the years, the reports gather the findings about cross sector accountability standards. On

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<sup>21</sup> Woods and Narlikar, 2001, 573. Woods and Narlikar list the US, the European Union, Japan, and Canada as the most powerful countries within the organisation.

<sup>22</sup> ILA, 2004, 4.

<sup>23</sup> ILA, 2004, 6.

<sup>24</sup> ILA, 2004, 8-12.

<sup>25</sup> One World Trust, 2008, 20.

<sup>26</sup> One World Trust, 2006, 11.

<sup>27</sup> One World Trust, 2008, 11.



average, international organisations score highest in transparency and evaluation, whereas non-governmental organisations have higher marks in participation. Global corporations do not have a constant result in the assessment, but, usually, have a better performance when it comes to the handling of complaints.<sup>28</sup>

Thirdly, the Transparency International, an organisation committed to the cause of combating corruption internationally, also echoes the same concern. It recently drafted, for instance, a report that diagnoses the ways in which FIFA's reputation can be enhanced and its internal corruption practices avoided. The report, written by Schenk, couches its recommendations of institutional improvement in the language of accountability and transparency, translated through a series of principles of anti-bribery, process and structure.<sup>29</sup>

These seem like a set of random examples. We could surely go much further in collecting other instances of the same accountability call, but that would be redundant. At any rate, these cases follow a general pattern that is increasingly present in international institutional-building nowadays. Accountability discourse resonates across the board. It seems to be, at least at the symbolic level, and however it gets translated into practice, the minimum common denominator that international institutions need to have. Apart from a resounding symbol, though, accountability is also a heuristic device, a lens that tells useful things about the international institutions I will investigate. It is not, to be sure, an unfamiliar lens. However, it has not yet been deployed to depict and contrast the major actors of the international Climate Change Regime, as I intend to do.

Lawyers, sometimes, have an uneasy attitude towards this "vague and suspiciously political term",<sup>30</sup> as Alvarez referred to accountability. Alvarez has obviously not meant that lawyers are unconcerned about the improvement of international institutions. Rather, he suggested that they are more inclined to conceive of and couch such improvement in a language that resonates more closely with the

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<sup>28</sup> One World Trust, 2008, 6.

<sup>29</sup> As Schenk points out: "A new era for FIFA requires a review of its internal governance and the introduction of transparency and accountability into its decision-making processes and operations." (2011, 3)

<sup>30</sup> Alvarez contends that: "(t)he notion of 'responsibility' has a grip on the legal imagination that the vague and suspiciously political term, 'accountability,' does not." (2006, 3) For Alvarez, lawyers "surely have something useful to contribute with respect to reforming voting procedures and oversight mechanisms; creating effective internal audits and ombudsmen procedures; or enhancing participation and access." (2006, 34) That is how he envisions the *role of lawyers* in enhancing accountability, a concern expressed in the epigraph of this introduction.

legal imagination, a tradition of thought that is still not at home with the potentially distinct roles of accountability. However, turning a blind eye to the concept, or seeking a functional equivalent within the legal conceptual repertoire, may impoverish what is lurking behind these public calls for accountability. The attempt to translate it into more familiar – and apparently interchangeable – terms like ‘responsibility’, fails to grasp the multiple accountability demands.<sup>31</sup> Squaring the circle, as it happens, might misguide the analyst.

Legal scholarship, to be sure, has not been indifferent to such a discourse. Alan Boyle, for example, defines accountability as a set of “techniques of political supervision and control”.<sup>32</sup> He had examined how states can be held accountable, by international organisations, for the implementation of their environmental obligations. His concern was not, however, directed towards the ways in which the international organisations themselves may be held accountable.<sup>33</sup>

This thesis engages with the latter issue, which was embraced, more than two decades later, by the global administrative law project (GAL). The project has dedicated a central critical leverage to the language of accountability. Its institution-building programme is mostly framed in that light. Alternative reformist approaches to global governance, in addition, have also taken a similar path. These strands have noticed that lawyers are trained and placed in a privileged position to be, among other things, accountability watchdogs and designers. Their responsibility, in that front, is to illuminate undetected accountability blind spots and indicate ways to fix and enhance them. In order to fill such lacunas, legal knowledge can sharpen, from its own partial angle, the observer’s capacity to diagnose and evaluate. Generally speaking, and within its delimited scope, this thesis seeks to participate in this collaborative intellectual enterprise.

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<sup>31</sup> Alvarez (2006).

<sup>32</sup> Boyle, 1991, 232.

<sup>33</sup> Boyle hints at how some procedural features of international organisations might help holding the states to account. As he claims: “To the extent that such bodies are public and open to other interested bodies or NGOs with observer status this accountability may even extend to a wider public”. (1991, 231) Two years later, he slightly refines that idea by adding the concept of representation: “To the extent that the proceedings of these bodies are public and open to representations from interested individuals or NGOs, the accountability of states for their environmental performance is enhanced.” (1993, 105) It was not his purpose, for sure, to elaborate on how these same features can also be consequential in holding those international organisations themselves to account. Interestingly enough, however, the elements of “publicness” and “openness” are key for conceptualising the accountability of transnational bodies as well.

I do not dispute the paramount importance and urgency of exploring the accountability of states vis-à-vis the international law of climate change. As we shall see, the specific bodies that will be studied here actually do have a role in that specific respect as well.<sup>34</sup> That is not, nevertheless, the primary concern of the present inquiry. I will rather examine how and in what sense some emerging transnational institutions are becoming accountable. There are strong reasons for pursuing a research of this sort, which were shortly rehearsed through the examples listed above and will become more extensive in the first three chapters. This enterprise surely does not supplant, thus, the need for probing how states are held to account. It rather intends to provide additional insight as to the legal features and institutional roles of this international regime.

### ***Research questions and a methodological caveat***

The aim of this thesis is to investigate, through the lenses of accountability, three particular institutional actors of the Climate Change Regime: the Intergovernmental Panel on Climate Change (IPCC), the Compliance Committee of the Kyoto Protocol (CCKP), and the Clean Development Mechanism (CDM). Such lenses, which are both descriptive and critical, display an important angle of those institutions.

Along the way, the thesis asks four interrelated research questions. The first is *conceptual*: what is accountability? The second is an abstract *normative* question: what is regarded as a desirable accountability relationship at the national and the global level? The third is *purely descriptive*: how accountable are the three institutions? The fourth, finally, is a *contextualised normative* question: how appropriate are their three accountability arrangements?

The two former questions are instrumental and ancillary to the two latter. That is to say, they respectively provide the analytical and evaluative frameworks on the basis of which a concrete description and a concrete normative assessment will be done. For sure, several subsidiary questions surround or are implicitly encompassed by those four research questions. To list a few: Why use the language of accountability to comprehend and respond to the sense of unease with the current

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<sup>34</sup> Specially the Compliance Committee of the Kyoto Protocol (CCKP), to be examined in chapter 5.

state of international law and global governance? What is the difference between legal and political accountability? Is accountability an inextricably state-centred template or is it versatile enough to transcend it? Why not pursue this query departing from the heavy-loaded terms like democracy and constitutionalism? Does the nonchalant tone of accountability moderates the political passions associated with those other ideals? Is accountability a value-neutral term? Is it apt enough for an enlightening description of current institutional arrangements? Or is it more suitable to address international concerns from the normative point of view?

Those three institutions of the Climate Change Regime, as every other international institution that one could single out, are accountable somehow, to some extent, at some point in time. This is not a novel or very informative claim.<sup>35</sup> To grasp exactly how accountable they are and, for the most part, whether they meet appropriate regimes of accountability, is a more taxing inquiry. In order to answer this question, one needs analytical categories to describe what the accountability regime is in each institution, and critical categories to judge whether it is a good accountability regime.

This path, depending on how the scope of each question is calibrated, could indeed be over-demanding. Specially the second and fourth research questions, which attend to highly disputed normative concerns, could be answered at various levels of abstraction and depth. This is a pertinent methodological warning. Since each of the questions could potentially lead to an inordinately vast investigation, that warning puts forward the obvious challenge of establishing the exact role and scope of the four questions. The extent to which the thesis is successful in meeting this challenge of reasonable calibration cannot be anticipated here. Rather, it is up to the reader to judge at the end.

From a methodological point of view, the approach delineated above does not automatically fit within a single department or category of the traditional taxonomies of legal research. This is certainly not a thesis on the pure theory of international law, and on the ultimate legitimacy criteria of global governance. It does, however, discuss the conflicting values embedded in the designing of some international institutions (in particular, the values and functions that underpin accountability). Such a work cannot help but borrow, therefore, some key concepts from that source, without which

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<sup>35</sup> See Keohane and Grant (2005)

lawyers are unable to proficiently navigate in the waters of legal reasoning and interpretation. Neither is this thesis a work on strict dogmatics of international legal materials and norms, concerned with the interpretation of treaties and with the rational reconstruction of that corpus of rules in the light of the formal ideals of consistency, coherence and sistematicity. Doctrinal disputes, however, incidentally surface in the course of describing some general features of the institutions discussed throughout the thesis.

The thesis is not, still, an ‘empirical work’ in the explanatory sense that empirical works are conceived and practiced in the social sciences – that is, to isolate the exact links between causes and consequences, or, to use their hargon, between the ‘independent’ and ‘dependent’ variables. It would be clearly improper, thus, to propose any strong empirical claim about how well accountability mechanisms are actually functioning, or a causal explanation for their occasional success or failure. The thesis actually steps backwards and touches upon the normative standards that this very sort of empirical investigation presupposes. And despite not being ‘empirical’ properly so called, it does engage in a type of institutional analysis by way of depicting the formal structures of the respective bodies, and also, when relevant, by taking some of their decisions and other outputs into consideration.

To sum up, the thesis fosters a legal inquiry that is conceptual, descriptive and critical: it stipulates, in view of contemporary academic literature, the features that make up the concept of accountability; it systematises some normative benchmarks that help devise a vantage point from where to evaluate concrete regimes; it depicts, through those categories, three real-world institutions; and, finally, it proceeds to a tentative assessment of those three institutions.

The four research questions not only scrutinise what sort of accountability formally exists in each of the three contexts, but also probe the consistency of such arrangements with the self-proclaimed purpose of each institution. The answer, at the very least, will hinge upon what the function and how powerful the institution is, on who the stakeholders are, and upon what kind of outcomes it delivers.

These are old questions worth asking over and over again, because they thematise momentous problems that otherwise might remain unnoticed. Answers will be tentative, contested and provisional for a long time to come. The answers so far given are embryonic, and the institutional responses even more rudimentary. The stakes could hardly be higher when politicians, scholars and citizens discuss the next

steps of global institutions, which gradually free themselves from states' mantle and become thicker and more intrusive.

When Alvarez, in the epigraph of this introduction, claims that “lawyers should not cede accountability to the politicians”, he is not saying that we, lawyers, should be focusing more on legal accountability and less on political accountability, however such controversial distinction is conceived. He is telling something deeper and institutionally more subtle. He more plausibly echoes Rosenau’s postulation that “the legal profession has a huge role to play” in developing the accountability mechanisms that will bring “transnational decisions closer to the people and publics affected by them.”<sup>36</sup> Rosenau is pointing to a particular lawyerly craft, which does not exactly correspond to the interpretation of rules, but actually to building and specially fine-tuning institutions and procedures in a purposive manner.

### *The roadmap*

The questions raised above can be better spelled out by a concise description of the structure of chapters. A bird’s eye view of the argument enables us to identify three main movements: the thesis first frames the terms of the discussion, which help to understand, describe and classify some accountability modes that are in place in the real world (chapters 1 and 2); it then introduces and summarises the historical background of the emergence of the Climate Change Regime within international environmental law (chapter 3); and lastly, it subjects the accountability structure of particular institutions to a thorough description and scrutiny (chapters 4 to 6). This is a contested interpretive exercise that requires not only the examination of written norms and practices, but also the excavation of some underlying principles that make sense of each respective institutional enterprise.

More precisely, chapter 1 will discipline the use of the term ‘accountability’, which is the chief conceptual tool for the remaining chapters. This chapter demonstrates why the answer to a seemingly obvious question – ‘what is

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<sup>36</sup> As Rosenau points out: “one could list a number of other mechanisms for furthering accountability without reliance on the domestic analogy. Most of these involve working with international organizations and national governments to promote further disaggregation, thus bringing transnational decisions closer to the people and publics affected by them. And it is with respect to these mechanisms that the legal profession has a huge role to play inasmuch as treaties and public policies will have to be rewritten to achieve desirable levels of decentralization.” (2001, 355)

accountability?’ – is not straightforward, and why the everyday common sense should not be taken for granted. The concept of accountability is more volatile than a cursory look at public debates might suggest.

Chapter 2 situates the ‘concept’ of accountability within the main ‘contexts’ of accountability, that is, it explores the question of where and why it makes sense (or has historically made sense) to talk about it. The contrast between the national and the transnational arena orients such query. The normative standards of accountability at the transnational level are drawn from one key contemporary strand of thought: the ‘global administrative law’ (GAL) project.

Chapters 1 and 2, therefore, ground the analytical scaffolding of the thesis and nail down the edges of a slippery, vulgarised and over-signified concept. While the former stipulates a descriptive blueprint, the latter elaborates on the contextualised normative standards that might fill in those categories. Both chapters, in addition, review a substantial portion of the relevant literature and draw a picture of the state of the art of the discussion in international law. This preparatory work operationalises the concept for the descriptive and critical exercises that follow.

Chapter 3 depicts the mosaic of the Climate Change Regime, the structuring concept of global common goods that lies behind it, the characterisation of climate as one of such public goods, and the historical political mobilisations that paved the way for the emergence of the current institutions. It justifies, moreover, why the comparative analysis of the IPCC, CDM and CCKP is apposite to the perspective of accountability.

Chapters 4, 5 and 6 try to “audit”<sup>37</sup> three different accountability systems, all of which are integral parts of an overall system of international regulation of climate change. These three chapters have a common structure. First, they proceed in two descriptive steps: a general portrayal of the institutional configuration (which comprises the institutional purpose, actors and processes) and a translation of that configuration into the language of accountability according to the blueprint of chapter 1. Second, they concentrate on an evaluative step, which I call ‘test of appropriateness’, informed by the tools provided by chapter 2 (this consists, by and large, in appraising whether and how those arrangements fits the demands of the GAL

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<sup>37</sup> To use Mashaw’s term (2006, 140).

project). Lastly, concluding remarks will seek to take stock of the overall analysis undertaken.

*Stipulating, contextualising and situating* the concept of accountability in three specific settings is, therefore, the expository thread that runs through the thesis, from chapters 1 to 6. In a way, the thesis can be seen as contributing with the GAL umbrella project by adding one additional ‘chapter’.<sup>38</sup> It is, in all fairness, so broad and versatile an umbrella, that it would be difficult to escape its purview. But the thesis can fairly be seen as a separate investigation of the different configurations of accountability. It should, at least, enable the reader to decipher what the concept of accountability is and which the diverse contextual instantiations and institutional implications are. Further, the reader should be able to visualise the institutional map of the international law of climate change, its nature and purposes. Finally, the reader will also consider how accountability is shaped in three actual contexts and what the alternative paths for institutional critique and potential reform are.

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<sup>38</sup> Project inaugurated by the founding paper of Kingsbury, Krisch and Stewart (2005).



## Chapter 1

### The concept(s) of accountability

*“Every action we take, we take within a set of overlapping accountability regimes.”<sup>39</sup>*

#### 1. Introduction

The concept of accountability is Janus-faced. Its duality is expressed in three distinct ways that are complexly intertwined with each other. The concept can: (i) display a descriptive or normative character, (ii) capture a political or extra-political relationship, and (iii) be shaped by legal or extra-legal properties. In order to get a satisfactory grip on that concept, one should put these three parallel dimensions into an adequate and coherent context. Should any of these three dimensions be left out of the picture, the explanatory capacity or normative appeal of the concept will significantly recede.

With regards to the first dimension of its duality, accountability can be conceived both as a given and as a construct, both as an inevitable “social fact” and as a “purposeful enterprise”.<sup>40</sup> Mostly, however, it seems to convey nothing but noble intentions in the ordinary political lexicon. That is to say, its normative side usually overshadows its purely descriptive one. Converted into a ‘feel good’ term, it often ends up working as a verbal weapon for political strategists and rhetoricians, not as a tool for legal and institutional analysis.<sup>41</sup>

Accountability, moreover, is not a solely political concept. A political agent, apart from making and implementing decisions, inevitably carries some burden of accountability for her or his actions. To some extent, moral agents, in several extra-political domains, also have to discharge a similar duty. The obligation to *give an account* to someone, somehow, for some particular act and at some point in time, and the expectation that this someone will react, positively or negatively, strongly or

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<sup>39</sup> Mashaw, 2006, 131. In the same vein, he also maintains: “We all feel ourselves accountable in one way or another to scores of other people and institutions. (...) The *ubiquity* of accountability regimes, and our entanglement in scores if not hundreds of them simultaneously, complicates the task of sorting regimes by family, genus and species.” (2006, 118)

<sup>40</sup> This dichotomy evokes the basis on which a substantial part of the famous jurisprudential debate between Hart (1958) and Fuller (1958) was constructed.

<sup>41</sup> Dubnick (2002 and 2005)

weakly, at some other point in time, cuts across the conventionalised borders between politics and other spheres of social life.

Finally, the concept may get more or less enmeshed with law. First, that might happen when the concept enters the province of institutionalised politics, a province constituted and governed by legal rules and procedures. Second, that might also happen when one confronts social relations that, despite not being purely political, have been densely legalised.

This chapter clarifies these manifold connections and delineates a framework to inform the analysis on which the thesis will embark in the following chapters. To be sure, there is no single way to lay down such theoretical backdrop, no self-evident typology or uncontroversial boundary that the concept of accountability encapsulates. Every attempt of conceptualisation passes over diverse aspects of the phenomenon it seeks to make sense of. Accountability directs itself to the phenomenon of power. It hinges upon the divide between power-holders and subjects to power. It establishes a peculiar and contingent sort of relationship between both sides (by way of converting the latter into an ‘account-holder’).

The variegated literature thereon oscillates between more restricted and more expansive concepts of accountability, without incurring, necessarily, in analytical inconsistency. The conceptualisation of accountability to be proposed here, as it is the case with any other of its several conceptualisations, is derived from a purposeful stipulation. Its litmus test, thus, should be its capacity to illuminate a precise aspect of power relations and, certainly, its coherence to the arguments and conclusions I will draw in the next chapters, not its conformity with any putatively authoritative definition.

This chapter elucidates accountability in a slightly abstract way, detached from a precise context. Such an abstract definition, admittedly, may not lead us far enough for a revealing study of institutions of either global or domestic governance. To contextualise accountability geographically and functionally across multi-level jurisdictions is the crucial task of the second chapter. A broader depiction of how accountability permeates the Climate Change Regime will be discussed from the third chapter onwards. For now, I concentrate on the conceptual grounding without which the further steps would remain too vacillating.

Before we focus on specific contexts and sites, we need to know what accountable and unaccountable powers essentially are (and the gradual variations

between both poles), and why the latter is deemed a rather alarming entity, while the former is quite vehemently cherished. Defining the concept and distinguishing its descriptive and normative, political and extra-political, legal and extra-legal aspects are major analytical steps undertaken by the accountability literature.<sup>42</sup> This chapter is no different to the rest of the literature on this topic, in that it aims to make sense of these various facets.

The next section (section 2) characterises political accountability as opposed to its extra-political forms and advances the basic structure of accountability relationships. Section 3 develops the fundamental *coordinates* of political accountability. Section 4 sketches the key *functions* political accountability may and has been expected to play. Finally, section 5 puts forward some *archetypes* that can be carved from the the variety of configurations between coordinates and functions.

## **2. Political and extra-political accountability: shifting and contested boundaries**

Accountability is not, by definition, restricted to politics, no matter how politics is conceived.<sup>43</sup> It transcends the domain of authoritative collective action and pervades social relations more widely and deeply.<sup>44</sup> One should be attentive to extra-political forms of accountability in order to understand what accountability shares with the political form and what is distinctive of the latter. Rather than a pedantic digression, this inquiry helps us both single out, at least to approximately, the elementary particle of the concept and discern the concept itself from its uniquely political manifestation.<sup>45</sup>

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<sup>42</sup> See, for example, Bovens (2010) and his distinction between accountability as a “mechanism” and as a “virtue”. Philp also claims: “we have to be clear about when an accountability relationship exists before we ask whether that relationship satisfies certain other principles or values.” (2009, 48) Or as Stewart and Kingsbury maintain: “demands are made for greater accountability without serious analysis of precisely what it consists in, how it can be achieved, and what its goals are.” (2008, 10)

<sup>43</sup> The exception, for sure, would be a dystopian totalitarian regime, where nothing is left out of the sphere of the political, where the “extra-political” is inconceivable because the respective political culture does not have any default criterion to exclude something from the realm of politics.

<sup>44</sup> See Mashaw, 2006, 118.

<sup>45</sup> Mashaw is also pointing to such structural commonality when he warns, for example, against “overselling” the dissimilarities between different types of accountability. (2006, 130) Philp is also concerned with distinguishing the core, definitional or necessary parts of the concept from its contingent and supplementary components. (2009, 48)

There are several types of extra-political accountability.<sup>46</sup> Cultural or social accountability is probably the most difficult to perceive and diagnose. When feminist activists, for example, complain about the “failure of the culture to hold men accountable”,<sup>47</sup> they do not necessarily ask for legal punishment or for the use of coercion to right the wrongs allegedly committed by men. Their protest runs deeper. It concerns the more diffuse and subtle ways through which a reputedly gender-biased culture curtails the autonomy of women to lead their own lives. Pressures of conformity and ossified social institutions would thus prevent women from being fully self-governing. It is tough to run against the social tide and prejudices with impunity. The demand for cultural accountability, in this sense, intends to unveil and to challenge the sources of social normativity as well as the informal ways through which standards of behaviour are furtively enacted and enforced in a potentially oppressive fashion. Accountability mechanisms, thus, would be constitutive of a more horizontal social fabric.<sup>48</sup>

Accountability relations also emerge in a variety of other extra-political settings.<sup>49</sup> Professionals, for example, may be called to account in the light of how they exercise their expertise vis-à-vis their peers and laypeople.<sup>50</sup> Lawyers, engineers or medical doctors take technical and learned decisions the appropriateness of which their respective clients or patients have limited capacity to judge. Still, this would not necessarily prevent the latter from having a right to demand, from the former, a justification for the choices that were made as well as from taking a stand on such choices’ acceptableness and accuracy. Their reputation towards their peers, moreover, may be a decisive factor for their professional success and self-satisfaction.

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<sup>46</sup> “Extra-political” should not be equated with “non-political” or “anti-political”, as if some issues were always and necessarily outside any allegedly essential boundaries of politics. Because the sphere of politics fluctuates, some issues that today are extra-political can be politicised tomorrow, and vice-versa. Ian Shapiro advances such insight, by claiming that politics is “both nowhere and everywhere”: “They are nowhere in that there is no specifiable political realm; (...) Politics are everywhere, however, because no realm of social life is immune from relations of conflict and power.” (2002, 206)

<sup>47</sup> Dines and Murphy (2011). A further example thereof is Stuart Mill’s identification of the lack of sufficient check on the conduct of men towards women: “There is no check but that of opinion, and such men are in general within the reach of no opinion but that of men like themselves.” (1869, 323)

<sup>48</sup> At the most general normative level, being accountable to others may even be seen as a central feature of a moral life. (Dubnick, 2010)

<sup>49</sup> Schedler also draws the distinction between private and political accountability (1999, 21).

<sup>50</sup> Onora O’Neill raises this question before indicating solutions that combine trust and trustworthiness: “In areas of concentrated specialisation and expertise, including medicine, science and biotechnology, how then can inexpert patients, citizens or customers judge the experts?” (118, 2004) Thompson also points, for example, to the role of collegiality in professional accountability (2004, 59).

Schools and teachers, in the same vein, are constrained by policy-makers, parents and pupils themselves to account for what takes place in the classroom or the school as a whole.<sup>51</sup> Corporations may be called to account for how their market actions affect the lives of their clients, employees or society at large; for what their products stand for; for how these products are made and advertised; for which patterns of consumption are encouraged; for how their employees are treated and how their facilities are constructed or, more broadly, for where their money is spent and investments are addressed to. The answers to all these questions impact different social groups that may wish or reasonably deserve to have an input on decisions that, one way or another, also concern them.<sup>52</sup>

Still, some other accountability relations may be dispersed across time and less immediately identifiable. Parents, for example, may be called to account to their children for the type of education they have provided or for the moral standards they have inculcated; spouses may be called to account for how they understand the duties and responsibilities of marriage; younger generations can call older generations to account for how the acts of the latter may have severely circumscribed the living conditions of the former;<sup>53</sup> even someone's present self can feel pressed to account to her hypothetical future self, in an exercise of prospective ethical imagination, for pursuing a consistent and justifiable ideal of good life.<sup>54</sup>

Cultural, professional, corporate, parental, spousal, generational or ethical accountability share something in common. In all these cases, there is a split between an agent who takes decisions and another who bears the impact of or has some stake in these decisions. There is, thus, a division of labour between two poles. Accountability is a quality that may or may not permeate the relationship between both groups. It exists where the decision-maker has the obligation or is factually impelled to account, and where the subjects to the decisions are entitled or factually able to demand an account for the actions or inactions of the decision-maker.<sup>55</sup>

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<sup>51</sup> On the role of democratic education in promoting a "culture of accountability", for example, see Nussbaum, 2010, 53-54.

<sup>52</sup> A recent example of how a company becomes accountable to investors and shareholders was the debut of Facebook in the financial market by opening its capital: "Whether it likes it or not, Facebook will now be accountable to a lot of people who do not share its values." (Stone, 2012)

<sup>53</sup> The debate about inter-generational justice and environment exemplifies this.

<sup>54</sup> Stephen Fry's letter to his "future self" and then his response, as an older man, to his past self, is an anecdotal example of such intra-personal reflection across time. (Fry, 2009)

<sup>55</sup> Onora O'Neill delineates the formal structure that accountability relations share: "Systems of accountability are highly varied, but they have a common formal structure. They are used to define,

Accordingly, accountability monitors, or even compensates for that division of labour by constraining, to varying degrees, the autonomy of the decision-maker. Hence, the behaviour of accountable decision-makers is far from unbound. Exogenous considerations will need to be factored into their decisions, which interfere with the decisions themselves. For sure, the force and the kinds of constraints will vary, and the extent to which they can credibly curb one's actions will also differ across time and space.

Accountability revolves around a power-holder and a "significant other".<sup>56</sup> The "other" is only "significant" as far as she has a credible claim on the power-holder, that is, the ability of demanding the latter to furnish an account for her conduct, of engendering, to use Bovens' phrase, a "reflective discursive encounter".<sup>57</sup> It is reflective since it lets the agent turn inward and find a justification for her acts; it is discursive because the agent also needs to turn outward and express this justification publicly and intelligibly in order to engage in a back-and-forth conversation; and, furthermore, it instantiates a non-arbitrary encounter inasmuch as there is some sort of link binding the two subjects. This encounter, to sum up, amounts to "an ongoing process of account-giving and account-taking".<sup>58</sup>

However large the diversity of accountability relationships can be, and despite their particularities, there is a core analytical structure that imbues all the examples above and below. Such structure can be enclosed by a set of rudimentary descriptive questions: Who accounts to whom? For what and on the basis of which standards? How and when? Under pain of what consequences?<sup>59</sup>

The first question brings forward the subjects of an accountability relation, or who the accountee and the account-holder are.<sup>60</sup> The second specifies the object and

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assign and help enforce second-order obligations to account for the performance (or non-performance) of primary or first-order tasks or obligations." (2007, 167)

<sup>56</sup> Bovens clarifies: "Explanations and justifications are not made in a void, but vis-à-vis a significant other." (2010, 951)

<sup>57</sup> For Bovens, accountability is supposed to be a "reflective discursive encounter between accountor and accountee". (2010, 953)

<sup>58</sup> As Dubnick has phrased it (2002, 5).

<sup>59</sup> Keohane (2003), Stewart (2008) and Mashaw (2006), among others, resort to fairly similar formulations of such a structural question to explain accountability.

<sup>60</sup> The two poles of an accountability relationship, according to a common terminology, are the "power-holder" and the "account-holder" (see Keohane, 2003). The contrast, however, is somewhat misleading. It insinuates that the former holds power at the expense of the latter. Disempowered account-holders, nonetheless, are no account-holders at all. To be sure, both actors are empowered in distinct ways and to a certain degree, as the chapter will extensively demonstrate. The relationship may, indeed, be asymmetrical. Still, constructing an accountable relationship is to empower a

standards of accountability, that is, the acts of power that are exposed to such constraint (after all, power-holders may not be accountable for acts that are not related to the exercise of such power), and also the benchmark of judgment that informs such account. The third settles the procedure and timing of an accountability relation, or the way it is done and the moment it takes place. The fourth, finally, prescribes the consequences that will ensue.

We can also turn this descriptive question into an explanatory one: Why does A account to B for the K acts, on the basis of X standards, through Y procedure and at time Z? The answer would have to spell out what is the causal story that binds A to B and its respective connection with K, X, Y and Z. Such answer would give us a thorough picture of how a definite accountability relationship is conformed. They still do not suffice, however, to grasp the normative dimension that a plea for accountability entails. Bringing a critical grip to the question, then, one could ultimately ask: who *should* be accountable to whom for what, on the basis of which standards, how and when?

The aforementioned *descriptive*, *explanatory* and *prescriptive* variants of this structural question are the key analytical prisms to understand the disputes and arguments about accountability. Accordingly, any attempt to classify an accountability relationship into this or that category will revolve around this fundamental formal pattern. Whether the accountability relationship is political or extra-political will depend on the contingent question of how we feed each of those components – the subjects, the object, the standards and so forth.<sup>61</sup>

The uniqueness of political accountability relates to the sort of power in play, namely, political power, to the subjects to which the exercise of that power is directed – the members of a political community – and to the issue that is under consideration – the general interest, the common good or the like.<sup>62</sup> Decisions taken under such

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previously disempowered actor, however soft or arguably insufficient that empowerment might be. To avoid this mischaracterisation, I will henceforth use the terms “accountee” instead of “power-holder”, and keep “account-holder” or “accountor” for the other side of the equation. When appropriate, I will still use “power-holder” if the very question of whether such actor is accountable is uncertain or simply not at stake. But that, again, does not at all mean that the “account-holder” is not a “power-holder” as well.

<sup>61</sup> By “contingent” I mean the historical and shifting borders of the realm of politics. (Shapiro, 2002)

<sup>62</sup> “General interest” is admittedly a rather vague and inevitably volatile definition of the realm of politics, but it should suffice for the current purposes. “Common good”, “collective good” or “public good”, without further qualification, would do no better, because different traditions of thought and different moments of political history would read them in different ways.

political authority are binding on and made in the name of the polity. Collective decisions based on the political pedigree may generate a duty of obedience whose enforceability does not depend upon the individual endorsement of the content of every single choice. The effectiveness of such collective decisions, as it happens with politics, presupposes a sense of trust and membership.<sup>63-64</sup> However blurred the boundaries between political and extra-political types of accountability might be in the edges, the distinction between these two types is worth drawing. Yet this does not mean that their relational structure is substantially different.<sup>65</sup> Quite the opposite is the case: political and extra-political accountability share much in common.

In sum, a power-holder may be deemed accountable when her power is plausibly constrained by the expectations, instructions or stakes of one or several external agents.<sup>66</sup> She is thus compelled to furnish an account for what she is doing or not doing. Such rudimentary definition, for sure, is still far from sufficient to fully equip the inquiry that this thesis intends to undertake. For instance, one could argue that it is too vacuous to come to terms with the contemporary debates about accountability deficits and gaps, overloads and excesses in either national or international levels.<sup>67</sup> This sketch must not be the entire notion of accountability these debates have in mind. After all, there is hardly an absolutely unaccountable power, political or otherwise, and some forms of accountability may be spurious rather than admirable.<sup>68</sup> Their protest calls for something more specific and normatively loaded, not for whatever sort of accountability one happens to discern.

In fact, the sheer existence of accountability is no reason for celebration. Politics is often embroiled in a string of more or less onerous accountability

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<sup>63</sup> The idea that a polity lies in the background of political accountability gets more complicated when the very existence of a polity is contestable, like on the supra-national level of governance, a question described by the next chapter.

<sup>64</sup> On the “sense of trust” as a pre-condition for meaningful accountability, see Philp (2009).

<sup>65</sup> The borders may actually be more porous than strict classifications might suggest. Mashaw emphasises the permeability between different regimes of accountability, which “flow and blend into each other” despite the differences in kind between public governance, market and social accountability. (2006, 127)

<sup>66</sup> As Schmitter asserts, the “ordinary cycle of accountability” revolves around “exchanges of information, justification and judgment”. (2004, 49) Political accountability, in other words, “implies an exchange of responsibilities and potential sanctions between rulers and citizens”. (2004, 47)

<sup>67</sup> Bovens et al, 2008, 227.

<sup>68</sup> Schmitter mentions, for example, the accountability mechanisms that may exist in sultanistic autocracies, military dictatorships or even absolute monarchies (2004, 48). Mashaw also points to a “monarchical model of accountability”: “Officials were accountable to the monarch and the monarch to God. We know little about how God kept his accounts, but monarchs rapidly developed rudimentary systems of auditing.” (2005b, 155)



relationships.<sup>69</sup> Behind the veneer of public rhetoric, the actual discussion has rarely been about whether a certain agent is accountable.<sup>70</sup> The critical question has rather been about whether one is accountable to the right constituency, in the right way, at the right time, for the right reasons or standards. Thus, in order to get some traction, one needs to delve deeper into these thorny normative elements. One does not contribute to this debate without openly recognising these normative underpinnings. Bracketing them is not a sustainable option because a value-free standpoint is simply not available.

### **3. The *coordinates* of political accountability**

The field of application of political accountability is vast. It comprises diverse sorts of political relationships, that are assimilated by an array of typologies.<sup>71</sup> The regimes of political accountability resort to a number of devices that inform the interaction between accountees and account-holders. The next chapter will locate these devices alongside multiple levels of governance and kinds of institutions. Here I introduce some of the chief categories that help to particularise these several possible arrangements.<sup>72</sup>

The structural question put forward in the previous section specifies a way to envisage the coordinates of political accountability (or, in fact, of any power relationship): the subjects, the object, the benchmark of judgment, the procedure, the timing and the consequences that bear upon such a relationship. Here, I intend to further spell out those coordinates that allow accountability arrangements to fulfil different functions and mould diverse archetypes.

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<sup>69</sup> As the epigraph that headlines this chapter also contends. (2006, 131)

<sup>70</sup> A power-holder, whoever he happens to be, is hardly exempt from any accountability relationship. This proposition does not, though, equate accountability with every single power relationship. It is not incompatible, thus, with a proposition that contends that there are unaccountable power relationships. The power-holder A, for example, may exercise raw and naked power against the actor B, and this would configure an altogether unaccountable power relationship. It would neither be reflective nor discursive. Still, A would almost certainly be accountable to other actors, even if those other actors were not the ones we wish them to be (neither the ones normative theories recommend).

<sup>71</sup> The typologies are multicoloured and will be further discussed later in the chapter. Some important ones are offered by Schedler (1999), Keohane (2003), Keohane and Grant (2005), Ferejohn (2007), Stewart (2008) and Morgan (2006).

<sup>72</sup> The idea of “coordinates” that I develop here echoes and, to some extent, replicates and expands the use made by Walker (2009).

Every accountability relationship has a distinct density. Depending on how its coordinates are configured, it will vary across thicker and thinner ends of a spectrum of possibilities. Thicker and thinner modes, as we shall see, imply not only that the accountees will feel more or less constrained by (or tied to) the account-holder, but also that it will be enmeshed in more or less complex, institutionalised and formal sorts of connection.

The following analysis will touch upon 11 prisms of accountability. The first prism through which that density can be observed purports to capture the level of formality of an accountability relationship.<sup>73</sup> This is a leading coordinate that pervades and shapes all others. Any power relationship will be more or less formal and legalised. This means that general and previously enacted legal rules may regulate each of the coordinates listed above, ascribe an official status to their subjects and specify their respective authority and competence. Accountability relationships may benefit from the qualities of the rule of law in order to become more stable and predictable.<sup>74</sup>

This legal angle invites a conceptual caveat. It would be erroneous, of course, to equate the distinction between political and extra-political accountability with the presence or absence of law (or adjudication). Law is only one of the several possible institutional conveyors that can promote both political and various sorts of extra-political accountability. It brings to accountability relationships a measure of rule-like formality and the accompanying apparatus for legal enforcement. Legal norms and institutions are commonly used for promoting corporate, professional or parental accountability, as well as for fostering political accountability. Law, however, does neither exhaust their potential nor capture informal or less rule-bound accountability tools that may also operate within each of these accountability relationships, including the political ones. Perceptible traces of accountability still subsist both in “law-free

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<sup>73</sup> Schmitter, for example, is sceptical towards a non-institutionalised form: “However complex it may be, political accountability must be institutionalized if it is to work effectively. This means that it has to be embedded in a mutually understood and pre-established set of rules.” (2004, 48)

<sup>74</sup> The mainstream literature on the rule of law explains what these basic qualities are. See, for example, Fuller (1968) and MacCormick (1989). Onora O’Neill, however, provides significant examples to show that setting the optimal degree of formalisation is a controversial enterprise: “Formalisation has advantages that are constantly mentioned by its advocates: mutual clarity of expectations, clear performance targets, defined benchmarks of achievement, enhanced accountability. But there is also the danger that more formalised procedures may deepen the distrust they seek to remedy.” (2004, 130)

zones of privacy and association”<sup>75</sup> or in law-free zones of political relationships, which should not be ignored. This explains why the categorical opposition between political and legal accountability, proposed by some typologies sketched in a later section, may be misleading part of the time.<sup>76</sup>

The second prism resorts to a traditional spatial metaphor. It regards how the power relationship between two agents materialises along horizontal or vertical lines. The vertical angle is more typical of accountability discourses. Substantially, vertical accountability is characterised by some asymmetry of power between accountees and account-holders. It can run downstream when the account-holder delegates power to the subject that will then be held accountable (in a “principal-agent” or “truster-trustee” fashion) or it can run upstream when the accountee is held accountable by those who are bound by her decisions or somehow bear their impact. To use a fashionable dichotomy, a vertical accountability relationship can run either top down or bottom up. The same actor, moreover, may be accountable both ways – from above and from below.<sup>77</sup>

Apart from this vertical axis, there can also be accountability relationships that take place along a horizontal (or gradually less vertical) line.<sup>78</sup> This may occur between two agents that are tied neither by a clear relation of “command-and-control” authority nor by an unmitigated duty of obedience. The constraint, in this case, is more delicate and stems rather from a cooperative commitment in light of mutual dependence. Scrutinising it further, a horizontal accountability relationship could be unidirectional if, despite the horizontality, only one of the subjects is truly held accountable to the other, or bidirectional, if there is a reciprocal constraint to account for the decisions that either subject takes. “Checks and balances” and its several internal tools for mutual control and cooperation are classical instance of this

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<sup>75</sup> Mashaw, 2006, 119.

<sup>76</sup> See section 5 (archetypes of accountability).

<sup>77</sup> This lies close to the typology proposed by Keohane (2003): on the one hand, accountability would be internal, based on an act of superior delegation, authorisation and support; on the other, it would be external, based on participation of those who bear the impact of decisions. Keohane and Grant slightly rephrase the dichotomy into “delegation” v. “participation” (2005). The World Bank is one of their examples of the simultaneous downstream and upstream dimensions operating at a single institution.

<sup>78</sup> To be sure, a sensible perception of the “phenomenology of authority” indicates that a pure top-down pyramidal model usually misses part of the phenomenon. Mashaw reminds of this important feature of power relations when he claims that bureaucratic hierarchies, for example, rather than sheer pyramids, operate through “dense networks” of influence and persuasion. (2006, 123)

horizontal bidirectional type, where a single agent is both an accountee and an account-holder at one and the same time.<sup>79</sup>

The third prism regards the way the two subjects of an accountability relationship are connected to each other. When the account-holder herself is able to perform the tasks involved in calling the power-wielder to account (tasks like setting standards, assessing choices and applying sanctions), the relationship is a direct one. When a subject arguably deserves to act as the account-holder, in the sense that she is affected by the power-wielder, but is not able to do so, and some surrogate carries out the respective tasks, this would be an indirect accountability relationship. The indirect character is due to the mediation of a third subject.<sup>80</sup> As an empirical matter, an effective accountability arrangement cannot be a relationship between the powerful and the powerless. The latter, for sure, should first be granted the power to hold the former accountable. A mechanism of surrogacy, thus, would bring a measure of second-best realism where advices of first-best idealism do not work.

The fourth prism sheds light on the multiplicity and control of these connections. Borrowing from Keohane, accountability systems will be unitary and pluralistic.<sup>81</sup> The former would be controlled by unified centres of command, on the basis of an ultimate sovereign or a clearer last word. The latter, in turn, would occur in contexts where authority is dispersed, and complex chains of multilateral connections and overlapping jurisdictions exist.<sup>82</sup> Whereas the former is easier to

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<sup>79</sup> The concept of horizontal accountability was crucial for O'Donnell to single out what genuinely representative democracies had that "delegative democracies" lacked: "Delegative democracies rest on the premise that whoever wins election to the presidency is thereby entitled to govern as he or she sees fit, constrained only by the hard facts of existing power relations and by a constitutionally limited term of office." (1994, 99) The species of "delegative democracies", by having only the vertical type, falls short of consolidated democracies: "In institutionalized democracies, accountability runs not only vertically, making elected officials answerable to the ballot box, but also horizontally, across a network of relatively autonomous powers (i.e., other institutions) that can call into question, and eventually punish, improper ways of discharging the responsibilities of a given official." (1994, 101)

<sup>80</sup> For a thorough analysis and exemplification of the difference between "standard" (direct) and "surrogate" (indirect and second-best) accountability, see Rubenstein (2007). She further specifies the first-order and second-order dimensions that this relationship can have: if a putative account-holder needs a surrogate in order to hold the power-holder accountable, but can hold the surrogate itself to account, then that first-order surrogate relationship will be complemented by a second-order standard accountability relationship. Nevertheless, if the account-holder cannot effectively hold even the surrogate to account, but a fourth agent can do that on her behalf, this will configure a second-order surrogate accountability.

<sup>81</sup> Keohane, 2002, 1128.

<sup>82</sup> For Keohane, the "nature of world politics means that any accountability arrangements at the international level will be pluralistic". (2002, 1130)

visualise and to operate, the second, due to the plurality of accountees and account-holders, hinders the assignment of responsibilities.

The fifth prism highlights a relevant nuance of accountability relationships in multi-member institutions. It shows whether it is the institution, organically considered, or each of its members, who is called to account. The process of holding a power-wielder accountable can work in the wholesale and in the retail or, to use another common dichotomy, be centripetal and centrifugal. In the former case, the entire collegiate (like a court, a regulatory commission or any deliberative body), rather than its members, may be assessed and held responsible for its decisions. In the latter case, on the contrary, the institution evades a collective responsibility, but each member is assessed by the way she has contributed to the collective performance.<sup>83</sup>

An elected parliament, in a constitutional system that also adopts judicial review of legislation, simultaneously provides an example of both: on the one hand, the parliament is subject to atomised accountability by the constituents, who are able to judge, reward and punish, by means of election or non-election, each representative, but not the institution itself;<sup>84</sup> on the other hand, the parliament is subject to organic accountability by the court that assesses the constitutionality of legislation. In such a system, the parliament is held to account both as “many” and as “one”, both in its plurality and in its supra-individual unity.

The sixth prism casts our attention to a formal variation that cuts across the two previous ones. It refers to whether an accountee and an accountor are both within a single institution that has a discrete personality (legal or not), or are, themselves, different institutions (juridically recognised or not). In the former case, accountability operates internally, whereas in the latter, we are presented with an instance of external accountability.<sup>85</sup> This sixth prism informs us whether the relationship between the two subjects, no matter whether they are related to each other by means of a vertical or a horizontal vector and independently of whether they are considered as a

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<sup>83</sup> See Keohane, 2002, 1129. Keohane shares Derek Bok’s view, according to which individual accountability, rather than making the members of Congress collectively responsible, would expose them to “the centrifugal pressures of special interests and constituent groups”.

<sup>84</sup> This will vary, of course, according to the kind of electoral and party systems that shape the electoral representation.

<sup>85</sup> This dichotomy is here used in a sense different from that defended by Keohane (2003); see footnote 38. According to Keohane, internal accountability refers to this closer vertical link that is typical of a principal-agent relationship, and can thus be contrasted with external accountability, which captures the relationship between power-wielder and those who are affected by the decisions. Keohane does not consider, for example, whether the principal or the agent have distinct legal personalities.

transindividual organ or as a group of individuals, takes place within one single entity or between separate entities.

An accountability relationship may also be marked by demands of expertise. Through this seventh prism, one should realise whether the subjects possess special knowledge, that is, whether they are technocrats and hence decide on the basis of reputedly objective, impartial and universalisable premises.<sup>86</sup> Here, four pictures may conceivably emerge between accountees and account-holders: (i) both are experts, which would lead to a strictly technocratic accountability relationship;<sup>87</sup> (ii) both are lay and nontechnical agents;<sup>88</sup> (iii) the accountee is an expert whereas the account-holder is not;<sup>89</sup> (iv) the accountee is lay whereas the account-holder is an expert, shaping a sort of guardianship regime.<sup>90</sup> To sum up, the fifth, sixth and seventh prisms explicate the “who” and the “to whom” slices of the structural question earlier raised.

Power-holders are usually expected to discharge a rather specific role. The performance of this task might be accompanied by substantive standards and expectations to appraise the output that is delivered (which might be related to expertise or not). The eighth prism, thus, reveals whether there are explicit criteria through which the performance of power-holders will be evaluated. The specificity of standards may vary and hence provide, to the power-holder, more or less precise guidelines on how her performance will be rated. The existence of public standards (or the lack thereof) will qualify, for example, both the exercises of voting and reason-giving, mentioned below.

The stringency of standards shapes diverse kinds of accountability relationships. Whatever their sources are, the more standards constrict the behaviour of the power-holder, the lesser room for the exercise of discretion will remain. The openness of standards turns an accountability relationship into one between a “truster”

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<sup>86</sup> See Bovens et al (2008) and Shapiro (2005).

<sup>87</sup> This type may be practised, for example, within a technocratic body, in which there is a hierarchical division of labour.

<sup>88</sup> This can be seen in the classical accountability relationship between constituents and elected parliamentary representatives, which is usually called “electoral accountability”.

<sup>89</sup> This evokes the traditional tension between technocracy and democracy and may be seen, for example, in the relationship between regulatory technocrats and the people generally conceived. (Shapiro, 2005)

<sup>90</sup> Though this type might sound too stylised, it suits our ordinary understanding of the relationship between a legislator (presumably “lay”) and a court in charge of judicial review of legislation (the “constitutional expert”). Even if one could claim that the legislator is supposed to be no less prepared than judges to handle legal and constitutional matters, as critical accounts on the legitimacy of judicial review have recalled, it is the opposite assumption that one of the mainstream arguments in favour of judicial review of legislation is grounded upon.

and a “trustee”. At the other end of a continuum of stringency, the relationship might be reduced to one between a “rule-setter” and a “rule-follower”, where discretion itself might disappear (and, with it, the very idea of accountability<sup>91</sup>). If accountability is not a matter of strict compliance with rules and standards, so as to render accountees “wholly subservient”<sup>92</sup> to account-holders, and if it should rather encourage a mindful exercise of judgment, some degree of agency for the power-holder has to be preserved. Wherever this threshold might be located, one might expect to see variations of degree along this continuum. As Philp suggests, at one pole there will be a “compliance-based system”, structured around a set of incentives for conformity and threats against non-compliance; at the opposite pole, there will be an “integrity-based system”, which prioritises agency over rule-following and hinges upon trust.<sup>93</sup>

The ninth prism exposes the *modus operandi* of an accountability relationship, or, in other words, how proceduralised it is. Several methods of participation, enquiry and contestation may sew a web of constraints on decision-making. The way in which the accountee is appointed, appraised or even removed from office by the account-holder may be governed by more or less consolidated practices and conventions. Voting and reason-giving are two stereotypical mechanisms through which these procedures are designed. By voting (or simply nominating), the account-holder can place someone in or, without further justification, remove someone from a position of power. By having the occasion to reason and interrogate (through a “notice and comment” mechanism, for example), the account-holder can also air disagreements that put pressure on the accountee, triggering a sort of deliberation between them both.<sup>94</sup> The power-holder, in turn, may have the obligation to articulate a public

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<sup>91</sup> For Keohane accountability relates to agency, that is, power-holders have significant choices to make, not just superior orders to follow. Therefore, genuine accountability relationships would presumably be closer to the “truster-trustee” rather than the strict “principal-agent” relationship. Keohane has clarified this as follows: “Cast in the language of power, an accountability relationship is a relationship in which an actor making a normative claim that it should have influence over another actor actually has such influence; and in which the actor subject to influence has significant discretion.” (2002, 1125) Philp shares this point: “Paradoxically, where the discretion or latitude of the office holder is eliminated in this way, he or she has nothing to explain or justify – nothing to account for!” (2009, 37)

<sup>92</sup> Philp, 2009, 43.

<sup>93</sup> Philp contends: “We trust people to do things under their own initiative and discretion and we use accountability for feedback and evaluation, but the accountability is parasitic on that trust”. (2009, 41)

<sup>94</sup> These two modes of control in the hands of account-holders (reasoning and voting) can be analogised with the distinction between “voice” and “exit” advanced by Hirschman (1980). Voice and exit, for Hirschman, are ways for a customer to protest against an economic organisation. Keohane also

justification for each decision she takes.<sup>95</sup> The accountability-promoting quality of reason-giving, therefore, would be able to operate in two directions: for the account-holder, as a right both to give and to receive reasons; for the accountee, as a pressing burden. To put it differently, while the former may constrain through the opportunity to reason, the latter is constrained by the duty to reason.

A variety of balances between transparency and confidentiality will ultimately delineate how the procedures of voting, arguing and commenting by the account-holder, or the onus of reason-giving by the accountee, set the stage for an altogether plausible accountability relationship.<sup>96</sup> Rather than accountability itself, the transparency of the procedures and decisions taken by the accountee constitutes the informational pre-condition for such a relationship to be set in place. On the whole, transparent authority is not, in and of itself, accountable. Accountable authority, though, cannot but be a minimally transparent one.<sup>97</sup> Total opacity and accountability do not match.

Accountability interactions may also be put into a temporal perspective.<sup>98</sup> This tenth prism illuminates the exact moment the power-holder expects a reaction from

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resorted to this distinction in order to exemplify market accountability (2002, 1131), but the analogy can be further explored in the realm of politics. One should not confuse this distinction, however, with the one between reason-giving and voting proposed by Ferejohn (2007). Ferejohn's account considers reason-giving only as a burden that some non-elected power-holders (specially judges) have to handle and, in that precise sense, as a pattern of reasoning that would enhance accountability. Ferejohn does not emphasise any special role of reason-giving as a means for account-holders themselves to challenge the power-holders (which Hirschman's "voice" would entail). This emphasis, therefore, overlooks a dialogic role that reason-giving can play as an accountability mechanism, and focuses only on a monological angle.

<sup>95</sup> Reason-giving, for Schedler, would turn monological power into dialogic, would make "both parties speak". It is therefore "opposed not only to mute power but also to unilateral speechless controls of power." (Schedler, 1999, 15) There is, for him, only a partial overlap between accountability (to someone, with duty to account) and responsibility (for something): "while accountability forces power to enter into a dialogue, the notion of responsibility permits it to remain silent." (1999, 19) Accountability, thus, goes beyond "attributing responsibility" and comprises the act of "giving an account".

<sup>96</sup> Schedler underlines the importance of transparency for accountability. Transparency would tackle the "black-box of politics" and the "opacity of power" (Schedler, 1999, 20). He also reminds, though, that politics may have "legitimate realms of secrecy" (1999, 20). See also Thompson, 2004, 130.

<sup>97</sup> On the point of transparency, see Stewart (2011). Onora O'Neill elaborates on the insufficiency of sheer transparency: "Since transparency is only a matter of disclosure or dissemination, it may limit secrecy, yet fail to ensure successful communicative transactions with others". (2007, 178) And later, she concludes: "Speech acts that need not engage with audiences – such as disclosing, distributing, disseminating, or even publishing – do not provide enough for those who seek to place or refuse trust." (2008, 180)

<sup>98</sup> Schmitter considers that the *temporal* perspective captures the accountability relationship and the "rhythms" of democracy better than the *spatial* one (vertical and horizontal). For him, the temporal dimension comprises three movements: "overture" (before), "intermezzo" (during) and "finale" (after). (2004, 54) In another article, he emphasises the centrality of the temporal perspective: "what



the account-holder, or the moment the latter has the opportunity to respond to the former. Two main temporal coordinates help discerning the possible variations. Firstly, the accounting may be *ex post* or *ex ante*, that is, it may take place after the decision by the accountee is made and implemented, consummating more or less concrete effects, or it may come somewhat earlier.<sup>99</sup> Mechanisms of preventive control illustrate the latter whereas the posterior ascription of responsibility exemplifies the former. A combination between the two possibilities may jointly form a single accountability relationship. Occasionally, when the power-holder anticipates the potential reactions of the account-holder and acts accordingly, the distinction itself may partially lose its grip. The distinction between *ex ante* and *ex post*, thus, captures an ambivalence in the phenomenon of ‘being accountable’: to ‘perceive yourself accountable’ (and acting accordingly) and to ‘be held accountable’ (and suffering the consequences of your previous acts) are not the same thing. Both may indeed coalesce part of, or even most of the time, but it is crucial to note when they do not.

Secondly, both *ex ante* and *ex post* reactions could also be qualified as immediate and prompt or as diffuse and gradual. Such temporal angle enables one to insert accountability relationships into a short or long-term horizon. Thirdly, these interactions across time can be characterised as a process and hence considered as following a set of phases. Roughly, this process would comprise, as Keohane and Grant suggest, three phases: first, the standard-setting; second, the process of informing, justifying and assessing; lastly, the sanction.<sup>100</sup> This sequence of phases, as an “endless loop”,<sup>101</sup> can permanently restart and configure iterative “cycles of accountability”.<sup>102</sup>

Finally, the eleventh prism, finally, refers to the weight of the consequences that ensue from the exercise of power. The amount of power bestowed upon account-holders to sanction accountees varies. Sanction is a wide concept and comprehends

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determines the outcome of ‘recursive cycles of mutual accountability’ may be more a matter of when than where”. (2007, 14)

<sup>99</sup> There is some measure of disagreement in the literature with respect to this temporal dimension. For Keohane and Grant (2005), among others, accountability is chiefly a matter of *ex post* control. Mashaw, however, asserts that “ex post sanctioning is likely to be evidence of a poorly functioning accountability system, not a successful one”. For him, the “crucial purpose of accountability is really forward-looking or prophylactic.” (2006, 132)

<sup>100</sup> Keohane and Grant (2005) set out this definition, which has also been adopted by Rubenstein (2007). Bovens also distinguishes three stages, but in a slightly different way. They comprise information, interrogation and judgment. (2010, 952)

<sup>101</sup> Rubenstein, 2007, 618

<sup>102</sup> Schmitter, 2004, 49

mechanisms with greater or lesser teeth. Some authors have equated the power to sanction to the power to remove someone from office (a typical example would be the power of voters to periodically elect, re-elect or “diselect” their representatives). This automatic equation, though, neglects the more subtle ways through which power may effectively be constrained and held accountable.

The power to remove the accountee is probably the most drastic but by no means the only instantiation of sanction there can be. Sanctions that fall short of sheer removal may comprise forms of public criticism and exposure, shaming and stigmatising, all of which can jeopardise the exercise and the very viability of legitimate power.<sup>103</sup> The shrinkage of reputation, for example, might be disastrous for decision-making bodies that operate within a terrain of soft power.<sup>104</sup>

Hard and soft or direct and indirect are apposite dichotomies to enclose the variety of sanctions there may be. It is undeniably important, for sure, to keep in mind that “inconsequential accountability is no accountability at all”.<sup>105</sup> Embracing this forceful maxim, however, does not imply reducing “consequential” to the most severe kind of sanction. Whether a soft or indirect sanction creates efficient and credible enough constraints on the power-holder is a different, if relevant, empirical question, the implications of which should be addressed separately, according to each context.<sup>106</sup> Some of them will do, while others will certainly not. Generalisations in such a domain would be prone to failure.<sup>107</sup> At any rate, the extent to which sanction

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<sup>103</sup> Sanctions may also include the curtailing of budget, the curbing of jurisdiction, among others (see Ferejohn, 2007). Although Keohane believes that sanction must be presupposed by an accountability relationship, he has a flexible approach to it. His understanding of accountability of the Supreme Court exemplifies it: “The reputations of particular justices rise and fall depending on these evaluations. For justices of the Supreme Court of the United States, a devastating critique of an opinion may surely constitute a sanction.” (2002, 1134) Mashaw also recognises the significant range of possible sanctions: “sanctions range from removal to simple displeasure, or perhaps ostracism from the inner councils of the ruling elite”. (2006, 121) For Rubenstein, “bad publicity constitutes a sanction in its own right”. (2007, 626)

<sup>104</sup> Like the agents that are deprived of significant “potestas” and heavily depend on “auctoritas” in order to be followed. The IPCC, as chapter 4 will indicate, illustrates this.

<sup>105</sup> Schedler problematises this “tight coupling” between accountability and sanction and argues that, however weaker it might be, accountability can prosper without proper sanction. (1999, 16-17)

<sup>106</sup> Rubenstein elaborates on the adequate amount of sanction: “the sanction must be neither too mild nor too severe: if it is too mild it will function not as an effective deterrent, but rather as an additional cost that the power wielder must bear (...) If the sanction is too severe, it might dissuade power wielders from taking worthwhile risks.” (2007, 620)

<sup>107</sup> One could certainly try, as a rhetorical strategy, to retain the term “accountability” for describing and demanding thicker arrangements. One would evade the risk of legitimating, through using that term, too thin relationships. But, as far as the concept is concerned, it seems coherent to classify as instances of accountability those relationships in which the applicable sanction is too light.

is a “definitional component” of an accountability relationship will depend on how one defines sanction itself.<sup>108</sup>

These are, in sum, the minimal properties of an accountability relationship. With such coordinates at hand, one should be able not only to answer the set of descriptive questions advanced by the previous section in a more thorough and meaningful way, but also to join the normative debate from a more comprehensive starting point. Without such an analytical map, the observer may not go too far in portraying and criticising so complicated arrangements. The following table pinpoints these elementary units:

<b>Prisms</b>	<b>Basic variations</b>
1. Formality	More or less legalised
2. Spatial vectors	Vertical (top down etc.) or horizontal (unidirectional etc.)
3. Connection	Direct (standard) or indirect (surrogate)
4. Direction	Unitary or pluralistic
5. Institutionality	Wholesale (as “one”) or retail (as “many”)
6. Personality	Internal or external
7. Expertise	Technocratic or lay
8. Substance (output)	Quality of standards; compliance-based or integrity-based
9. Procedure (input)	Voting, reason-giving and other participatory tools
10. Timing	<i>Ex ante</i> , <i>ex post</i> ; immediate, gradual; multiple phases
11. Consequence	Hard and soft, direct and indirect sanctions

One can certainly play with these abstract ingredients and speculate about which recipes would engender the thickest and the thinnest relationships. Authors widely diverge on finding the exact thresholds, and occasionally deny the title of accountability to some of its thinnest instances.<sup>109</sup> Here, I do not intend to engage in

<sup>108</sup> For Philp, sanctions are not part of the core concept. This opposite view, for Philp, “muddles the object of description”. (2009, 35)

<sup>109</sup> For Stewart, accountability is either thick (with possibility of sanction) or it is something else. Expanding the concept to capture other sorts of relation would damage its “integrity and utility” (2008, 3 and 9). Keohane and Grant are slightly less demanding. For them, accountability necessarily involves the right of account-holders to judge and punish the power-wielders. Besides, it occurs only after the fact, but can exert some *ex ante*. (2005, 29-30) Schedler is more flexible. Accountability, for him, has three dimensions – information, justification (answerability) and punishment (sanction) – but they do not have to be fully present for accountability to exist. (Schedler, 1999, 20)

this sort of definitional line-drawing. The coordinates offer a broad picture of how power relations are configured and how power-holders may be constrained and held accountable.<sup>110</sup>

When pressed against complex concrete arrangements, these mostly dichotomic categories may fall apart somewhere at the edges. Abandoning these categories, however, would give away a useful source of insight, an angle without which, I believe, important things would otherwise remain unsaid and sound hardly plausible. Knowing how accountability relationships are structured along all these dimensions is an instructive, if not indispensable, step to understand them. Ignoring its “complex dimensionality”, as Schmitter contends, would restrict understanding.<sup>111</sup> The next section sets out the main functions one can derive from such coordinates.

#### **4. The *functions* (and *dysfunctions*) of political accountability**

Institutions are not built in order to be accountable in the first place.<sup>112</sup> Some way or another, however, they are likely to be. If we needed a concept to help us minimally describe the features of this specific power-relation, the distinctions elaborated above would fairly do. However, in order to gain normative traction – or to know both who, how and why should account, and who, how and why should hold to account – one should further engage with the values and purposes involved. That would presuppose, to start with, a conception of legitimate politics.<sup>113</sup> Accountability conveys no more than a special link between a power-holder and someone else. The mere perception of such a link, in itself, leaves us in a normative vacuum.<sup>114</sup> One can presume neither a positive nor a negative quality in it. There is no such thing as a

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<sup>110</sup> Mashaw, for example, draws a comparison between “public governance” and “market” accountability in a way that, however less comprehensively, echoes the coordinates here systematised. In the former type, obligations would flow mostly in one direction (unidirectional). It would also be formalised, structured and collective. The latter, in turn, would be decentralised, informal and individualized, and comprise a more coordinate structure, based on mutual obligations. (2006, 128)

<sup>111</sup> Schmitter argues: “accountability cannot be captured by a single variable due to its ‘complex dimensionality’”. (2007, 19)

<sup>112</sup> As O’Neill implies, accountability is a second-order phenomenon. (2007, 167)

<sup>113</sup> In other words, a defence of accountable authority implies a notion of legitimacy, a statement of why it has sufficient moral standing to deserve compliance. This is a common claim of several authors. See, for example, Schmitter, 2004, 49.

<sup>114</sup> That is exactly why Philp advances a “parsimonious” or “stripped-down” concept of accountability, so as to distinguish its core from its occasional supplementary ingredients. Not doing that would “fail to distinguish between what something is (the nature of the component) and what is necessary for that component to produce a specific result.” (Philp, 2009, 32)

“pure theory” of accountability, as far as a value-laden prescription is concerned. That is, the appeal of the contemporary call for accountability does not stem from accountability *tout court*. Such call is not self-standing, but rather ancillary to an external ideal, be it explicitly articulated or not.<sup>115</sup> Or so I shall argue.

The most plausible way to defend and justify accountability, in this sense, is instrumentalist. Instead of an end in itself, it is a means to an end.<sup>116</sup> More precisely, it is a means to a series of dissimilar and usually conflicting ends that those external ideals articulate. There is no single self-evident end to be promoted. This discomfiting feature leads to an inevitably contested dispute.<sup>117</sup> Which are, then, the expectations that are embedded in current accountability-talk? What are the institutional ills it is supposed to cure or the vices it is expected to prevent? When can accountability, to sum up, be seen as a good thing, as a positive qualifier of power relationships?

This is an intricate theoretical problem, as controversial as political philosophy can get. To take a firm stand on such dispute is beyond the scope of the thesis. Nevertheless, one cannot entirely dodge the question if one wants to somehow participate in such debate. If anything, it is crucial to clearly identify the acceptable normative goals of accountability and be prepared to accept that, depending on the context, these goals may be mutually inconsistent or reinforcing. It is up to the context-oriented institutional designer to strike the suitable balances and value-judgments. Tensions can hardly be solved, but a conscious designer has to manage them.<sup>118</sup> Analytical transparency is a pre-condition for meaningful dialogue on the matter.

Accountability scholarship roughly puts forward four pivotal normative rationales to back up its claims. Accountability devices would orient themselves (i)

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<sup>115</sup> Accountability, as it has been argued, has a close affinity with a multiplicity of uplifting terms. As Bovens maintains, it would be synonym for several “loosely defined political desiderata, such as good governance, transparency, equity, democracy, efficiency, responsiveness, responsibility, and integrity”. (2010, 946)

<sup>116</sup> Stewart, for example, contends that accountability is just one of the three mechanisms of governance, all of which aim, ultimately, to the promotion of participation and responsiveness. (2008, 2)

<sup>117</sup> As Schmitter reminds: “some of its positive properties may be incompatible with each other or, at the very least, involve complex tradeoffs.” (2007, 17)

<sup>118</sup> Managing rather than solving inevitable tensions is the fate of the institutional designer, as Mashaw has insightfully put. He shows, for example, how the tasks of managerial effectiveness and political responsiveness may become “strongly competitive”. (2005b, 160) And he adds: “But, this is a design problem that can only be managed, not solved. For, it entails maintaining an appropriate balance among competing forms of accountability”. (2005b, 154)

towards limiting power and inhibiting abuses; (ii) towards recognising, listening and responding to the plurality of voices of the account-holders – those who are deemed to have legitimate stakes on the matter; (iii) towards building institutional capacity – a particular craft for taking substantively good decisions; or, finally, (iv) towards fostering allegiance and obedience from the account-holders. Each rationale has a different story of legitimacy to tell, a distinct reason as to why accountability is a desirable attribute.<sup>119</sup> The first rationale is defensive, the second is emancipatory, the third is technical and the fourth is strategic. I will call them, respectively, the constitutional, the democratic, the epistemic and the populist ambitions of accountability.<sup>120</sup> Such polemical terms evoke concepts with complicated tensions and overlapping zones, not to mention their diverse yet intertwined historical traditions, which I will not directly address. I resort to them as terms of art.

Let me elaborate a bit more on these four aspects of legitimacy. The constitutional aspect reverberates a conventional way to justify accountability. It basically seeks “to keep power from running wild”,<sup>121</sup> to moderate and counterbalance its weight through a set of procedural techniques and substantive standards. Under such perspective, legitimate power cannot be raw and naked power. It should be restricted, so that the arguably constant danger of abuse (that is, of overstepping the commonly regarded limit) gets domesticated. This political maxim is meant to serve a clear-cut goal: the protection of individual autonomy. Accountability, here, enables account-holders to oversee their accountees, to ascribe responsibilities to them and to somehow punish or reward them, if necessary. The point of constraining authority, thus, is to block arbitrariness, to retain power under check.<sup>122</sup>

The democratic variant of accountability is concerned with something else. Regardless of limits or checks, it is meant to give any member of a political

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<sup>119</sup> The dark side of the normative coin, or the spurious accountability relationships (anti-constitutional, anti-democratic and so forth), will be not elaborated here, but can be taken as the opposite of each of these rationales, what they try to combat. A different negative side of accountability devices, however, is their occasional dysfunctionality, which will be better elaborated below.

<sup>120</sup> Bovens et al (2008) and Bovens (2010) came up with a slightly similar approach and grasped three different roles that these mechanisms might have: constitutional, democratic and learning.

<sup>121</sup> Schedler, 1999, 19.

<sup>122</sup> The constitutionalist project, to be sure, is not only concerned with limits (its defensive or negative side), as others have forcefully shown, but also and firstly with empowerment itself (its constructive and positive aspect). On what can be called “positive constitutionalism”, see Sotirios Barber (2003) and Waldron (2010). I will focus only on the limiting and negative property of “constitutional”.

community who might have been affected or otherwise influenced by the exercise of authority, some fair leverage in collective decision-making. The usually rhetorical appeal of “the people” as the one and only source of legitimate power is, in practice, translated into more or less convoluted chains of power delegation or “transmission-belts”.<sup>123</sup> If authority is accountable in that way, one is supposed to trace back and ultimately find some incarnation of “the people” in the decisions that ask for collective compliance. Procedurally, this means that some channel must carry the plurality of voices into the final decision-making table, however distant that table might be. These voices, to invoke three other mainstream terms, are “included” or “represented”, and somehow “participate” in that table.<sup>124</sup> The farther away this delegation string goes, nevertheless, the quieter the people’s voice and hence the less credible the democratic vestige becomes.<sup>125</sup> How far-off that string can be stretched for convincingly granting the democratic pedigree is a disputed issue.

Accountability arrangements, however, do not only interpose safeguards between power-holders and those subject to power in order to prevent abuses (constitutional rationale). Neither do they solely seek to receive the inputs of “the people” and somehow reflect and express their will, however loosely that will is conceived (democratic rationale). It is not only a transactional cost that hampers the efficiency of decision-making for the sake of other evenly important political goods. Accountability, as it has been argued, also carries a “promise of performance”<sup>126</sup> or an “institutionalized capacity to learn”.<sup>127</sup> It aspires to enable the power-holder to take appropriate decisions, to become an instrument for epistemically better choices. In that respect, accountability would improve the cognitive abilities of the institution and have a bearing on efficiency itself.<sup>128</sup>

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<sup>123</sup> A term conventionally used in US administrative law. See Stewart (1974) and Mashaw (2005a).

<sup>124</sup> Inclusion, representation, participation and responsiveness are, among some others, derivative virtues that underlie rhetorical appeals to democracy.

<sup>125</sup> Ferejohn (2007), for example, believes that this distance from electoral sources of authority can be compensated by a more stringent duty of reason-giving (like the one courts face), and this would still fit a democratic framework.

<sup>126</sup> For a sceptical view of the too quickly assumed “promise of performance” embedded in new reforms of public administration, see Dubnick (2005). The plausible possibility that accountability devices make power more competent does not necessarily lead to the empirical conclusion that power-holders will be actually willing to be held accountable.

<sup>127</sup> Bovens, 2010, 954. This “learning dimension of accountability”, for Bovens, co-exists alongside the democratic and constitutional dimensions.

<sup>128</sup> Rubenstein highlights the epistemic dimension that springs from the exercise of judgment: “The back-and-forth instigated by the power wielder’s explanation can be a source of mutual learning and compromise and distinguishes accountability from mechanical enforcement of rigid rules.” (2007, 619)

Quite often, the concern with a putative accountability deficit is related neither to the risk of occasional power abuse nor to the lack of popular embedment. It is rather an apprehension about a possible malfunction, about the danger of power being used unwisely and unskilfully, even if, presumptively, with no arbitrary intentions, or arguably, with no elitist or exclusivist predispositions. In that case, accountability would not be dispensable no matter whether we could prove, hypothetically, that power-holders were the pure embodiment of reasonableness, self-restraint or popular conscience (that is, no matter how power-holders could fulfil our constitutional and democratic demands).<sup>129</sup> This is a less visible aspect of an accountability relationship and must be elaborated with care.

Somehow, there is a banal connection insinuated here. After all, if, through echoing a prevalent normative premise of western political thought, we argue that arbitrary and obscurantist decisions are necessarily wrong, then accountability devices that manage to obstruct these sorts of decisional faults should presumably enhance competence. Such negative sense of the epistemic promise does not exhaust the present claim though.<sup>130</sup> Otherwise, the epistemic ambition would simply be redundant, that is, would be conflated with either the constitutional or the democratic ones. Nonetheless, a well-crafted accountability relationship, some will argue, has a competence-based virtue for reasons that do not simply replicate the constitutional or democratic ambitions.

One could try to identify the singularity of the epistemic point by arguing that the notions of abuse and impermeability, which the constitutional and democratic dimensions respectively intend to rectify, are formal, whereas the epistemic point is substantive. The same political decision, thus, could be abusive or impermeable from the formal point of view, but still correct from a substantive perspective, or vice-versa.<sup>131</sup> But to classify the constitutional and democratic demands as merely formal, and to reserve the substantive pull for the epistemic facet, would neglect the intricate

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<sup>129</sup> Mashaw, for example, claims that there is an inherent demand of competence within democratic politics: "Indeed, in some significant sense, electoral politics cannot produce responsive government unless it is harnessed to technically competent administration. And incompetence is politically dangerous." (2005b, 168)

<sup>130</sup> As explained earlier, the epistemic promise is here understood as the expectation that accountability arrangements are instrumental, among other things, for producing good decisions.

<sup>131</sup> That is, the procedures could be tainted by abuse and lack of transparency, but, at the same time, could deliver a reasonable and defensible output, or vice-versa.



interdependence between form and substance that both ideals entail.<sup>132</sup> It would strain this formal/substantive dichotomy and yet offer an artificial answer to the question of which promise of accountability has a bearing upon the decisional output.<sup>133</sup>

The epistemic promise is actually more aspiring. It affirms that the performance of an institution is, to some extent, contingent on the sort of accountability arrangement that applies to it.<sup>134</sup> The epistemic promise is not only concerned with avoiding abusive and impermeable decisions, even if we envisage them from a substantive point of view. It also aims to highlight how accountability devices may develop, depending on the context and decisional issue at stake, the aptitude or the proficiency of an institution to reach better decisions (according to some criterion of correctness). It purports to call our attention to the fact that, oftentimes, there is an intersection between being “accountable” and being “competent”, a correlation between accountability devices and decisional accuracy.<sup>135</sup> Among other things, then, choosing the adequate accountability regime would also presuppose “weighing the comparative competence or incompetence of alternative accountability arrangements.”<sup>136</sup> An accountability device is hardly indifferent to that.

Lastly, accountability also has a populist aspect.<sup>137</sup> Institutions tend to obtain better compliance with their decisions through mustering, with the aid of

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<sup>132</sup> There is no need to embark in this tricky theoretical controversy here. For a general explanation of the parallel formal and substantive aspects of democracy and constitutionalism, see Dworkin (1995). One could still claim that, whereas the constitutional and democratic ideals have a substantive ambition of a *negative* sort (that is, to avoid abuse and impermeability), the substantive aspect of the epistemic expectation would be *positive* (to find the best answer). This would come closer to what I intend to convey by the epistemic point.

<sup>133</sup> For Stewart, in a similar vein, the problem of disregard and the goal of accountability have both a procedural and a substantive aspect: the former is related to fairness – “to help ensure that the affected are fairly and appropriately treated in the decision made”; the latter is related to justice – “it may not be sufficient to satisfy the procedural regard (...), if the decision itself treats the affected with manifested injustice.” For him, this does not make procedure collapse into substance because substantive requirements still provide decision-makers with considerable “latitude in striking the balance”. (2008, 5-6)

<sup>134</sup> Or, in Mashaw’s words, regimes are “regulators of institutional performance”. (2006, 154)

<sup>135</sup> The epistemic promise should not be confused with the distinction between “technocratic” (or “expertocratic”) and “lay” authorities, drawn in the previous section. The epistemic mission, generally conceived, can be pursued either through a technocratic or a lay authority, either by experts or non-experts. Its plausibility will depend, for sure, of what is the decisional issue under consideration and the respective institutional arrangement designed to handle it.

<sup>136</sup> Mashaw, 2006, 116.

<sup>137</sup> The term “populist” has ambivalent meanings, some ostensibly pejorative and others more neutral and analytical. For an example of the former, see Couso (2010), who describes the “populist temptation” of current presidential regimes in Latin America as a danger of authoritarian regression and personalistic cult of a single leader. For an example of the latter, see Dahl, who contrasts “Madisonian” democracy to what he calls “populistic” democracy, a regime in which “majorities have

accountability mechanisms, a positive public perception. This property strengthens the reputation that an accountable institution conveys as well as such an institution's consequent ability to encourage actual obedience. It illuminates a plain causality: if an institution is able to "maintain the confidence of the public"<sup>138</sup>, it has a greater propensity to be accepted. Accountability would help us construct, maintain and protect the trustworthiness and hence the social effectiveness of an institution.<sup>139-140</sup>

These four dimensions, for sure, may crisscross each other from several angles when one uses them to observe concrete arrangements of accountability.<sup>141</sup> The same device may be expected to play more than one function. For example, power may be limited by incorporating the diverse voices of the stakeholders; or an institution may construct its reputation and prompt collective compliance precisely because abusive decisions get blocked by the adoption of a veto point, and so forth.<sup>142</sup> Arguably, a single device may simultaneously fulfil all the four functions and, thus, reach a symbiotic arrangement.

Cases of benign convergence might, indeed, exist. But the four ambitions do not always join forces. When their vectors clash or compete, some accommodation may prove indispensable.<sup>143</sup> Cases of divergence among the four functions tend to raise tricky normative dilemmas. If a point of equilibrium is not carved, the whole

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unlimited sovereignty". (2006, 37) The meaning stipulated here is closer to the latter, although I do not enter the specificities of majority rule.

<sup>138</sup> Keohane, 2003, 15.

<sup>139</sup> It would help "satisfy disappointed claimants", to use Mashaw's words (2006, 141). See also Dubnick, 2002, 5. Although trustworthiness cannot guarantee that actual trust will be earned, it gives good reasons for trust to be deserved by institutions. As Onora O'Neill argues: "Good reasons for rejecting blind trust are not good reasons for rejecting intelligent trust." (2007, 164) She further argues: "Good systems of accountability [...] can improve trustworthiness, and may offer helpful evidence for placing and refusing trust intelligently. But they do not and cannot supersede trust." (2007, 163) In another book, she clarifies what that would entail: "Unless those who hold others to account are informed, unless they judge matters independently and unless they communicate intelligibly to relevant, specific audiences, accountability may do little to support trust". (2008, 180)

<sup>140</sup> One should not mistake this populist aspect of accountability, however, with the pre-existing trust that should arguably obtain in order for accountability relationship to take hold. For Philp (2009), trust is an underpinning feature of accountability, not the product of it. This tension, however, should not be regarded as a binary "chicken-and-egg" question. Rather, both aspects (namely, trust as a precondition, or trust as a product) can be seen as mutually reinforcing, as both cause and consequence.

<sup>141</sup> As Mashaw contends: "No institution really serves only one purpose or goal, and, therefore, no institution should be expected to be responsive to only one form of accountability regime." (2006, 153)

<sup>142</sup> For an interesting account of the interrelationships between different conceptions of legitimacy (specially between moral, legal and sociological), see Fallon (2005).

<sup>143</sup> Mashaw, 2006, 130 and 147.

arrangement may become dysfunctional.<sup>144</sup> Accountability becomes a laudable relational property to the extent that such balance is well struck.

Apart from the mismatch of different purposes, a quantitative sort of dysfunction might also arise when the amount of the accountability burden becomes counter-productive.<sup>145</sup> Different sorts of deficits or excesses will emerge from the miscalculation of those functions. Processes of accountability deflation or inflation, thus, should be assessed with care. Inflation can be a welcome involvement if the status quo characterises a deficit, and vice-versa. Finding the optimal amount of accountability is a perpetual challenge of legal analysis and institutional design, which needs not to extrapolate the tipping point where accountability turns to be harmful rather than beneficial.<sup>146-147</sup>

Deciding how accountable an institution should be, thus, is not a straightforward and one-dimensional choice of an institutional designer. The appropriate accountability package is contingent on the ultimate purpose of an institution. The appropriate modular construct<sup>148</sup> can be assembled only after such a purpose has been made sufficiently clear.<sup>149</sup> Once fully developed, the modular construct has to delve into occasionally incongruous functions and to find out what devices better fit the particularities of this or that case. Conflicts of equally valuable or incommensurable functions demand the exercise of balancing or, to phrase it in

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<sup>144</sup> There is a significant literature on the inconsistencies, distortions or excesses of accountability arrangements. See Bovens (2007 and 2010) and Koppell (2005 and 2010). Dysfunctionality would refer to an arrangement of those expected functions that cannot be minimally met because of the wrong calibration of each chosen device.

<sup>145</sup> As Bovens claims: “more accountability does not necessarily produce better government. Accountability overkill discourages innovative and entrepreneurial behaviour in public managers”. (2010, 953) See also Koppell (2005) on “multiple accountability disorder”.

<sup>146</sup> Among the decisional flaws that might emerge, authors pay particular attention to “tunnel vision”, “ritualization”, “defensive routines”, “mutual stereotyping” and “hostile behaviour”. (Bovens et al, 2008, 228 and Bovens, 2010, 954)

<sup>147</sup> A traditional pathology is the overemphasis on conformity to strict rules, which reduces discretionary judgment. This is a typical epistemic dysfunction: the decision-maker prioritises the avoidance of punishment at the expense of making creative judgments, and instead of thinking on what the good decision is, she gets primarily concerned with minimising the risk of being penalised.

<sup>148</sup> Or, alternatively, “radial concept”, as Schedler would prefer. Schedler explains: “They are continuous variables that show up to different degrees, with varying mixes and emphases.” (1999, 17)

<sup>149</sup> The institutional purpose logically precedes, of course, the question of how accountable this institution should be. As Mashaw remarks: “much of the dispute about accountability is a dispute about what particular institutions are meant to do, not how accountable they are in the doing of it.” (2006, 117) For him, the question of how accountable an institution should be is “parasitic on beliefs about the true purposes of the program” (2006, 155)

economic jargon, imply trade-offs and cost-benefit assessments.<sup>150</sup> In what follows, I expose the main archetypes that can be found in real world institutions and some trade-offs that have to be struck.

## 5. The *archetypes* of political accountability

“Archetype” sounds a bit pompous and pretentious. Indeed, the term has been borrowed and distinctly conceptualised by eminent traditions of thought.<sup>151</sup> Etymologically, however, it evokes a primary template, an elementary pattern from which we derive more complex objects and concepts. In this non-technical sense, “archetype” is an adequate term to refer to the basic modules that accountability arrangements put together in order to pursue the functions enumerated above. An archetype, in other words, is the classical instance of a proper function, the paramount and arguably first-best institutional translation of that general principle. Among the infinite fancy permutations of coordinates one could think of and experiment with, I will first enumerate some that are more frequently found in existing institutions and will then discuss their functional interrelation.

As for the democratic function, nowadays, one can hardly acknowledge that a political regime is democratic if it does not, at the very least, collect and convert individual votes into a quota of seats within a representative body through a reliable procedure (usually through an arithmetic formula that materializes a plausible conception of equality, as e.g. “one man, one vote”). Competitive elections, the act of delegation through which a principal-agent relationship between constituents and representatives is founded, are the first-best archetype of democratic accountability. Voting is the basic procedural mechanism to empower or disempower, to reward or sanction the representatives according to their performance as appraised by the constituents.

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<sup>150</sup> As Schmitter puts it: “some of its ‘positive properties’ may be incompatible with each other, or at least may involve complex tradeoffs. High levels of individual participation may not be so benevolently linked to subsequent attention and sense of obligation.” (2004, 56)

<sup>151</sup> Dictionaries of philosophy map the abundant meanings and manifestations of this concept in the history of philosophy. In the contemporary literature on law and politics, it is also used with some frequency. Wind criticises the focus on federal and national models as the only “archetypes of international transformation” (2003, 124); Carens points to Nazi Germany and Apartheid South Africa as the “archetypes of moral wrong” (2000, 215); Manin examines the historical moment when the British House of Commons was “the archetype of parliamentarianism” (1997, 204).

Second-best supplements, to be sure, can also resonate the democratic idea. Devices of participation, responsiveness, transparency and the like, despite engendering spheres of engagement and influence that fall short of decision-making power, establish horizontal constraints that can conceivably be traced back to the people. All these mechanisms, admittedly, tend to be primarily but not exclusively associated with democratic accountability, since institutional arrangements are versatile to pursue a large variety of ends. Elections, for example, are first and foremost perceived as a tool to empower the people. However, one should not underestimate their ability to limit governmental power, to trigger adequate legislation and policies and to induce the compliance of the constituents with the decisions of representatives (that is, to pursue the three other functions of accountability).

Constitutional archetypes, in turn, are of two sorts: on the defensive and negative side, the procedure of horizontal checks and balances and the substantive standards that underlie the discourse of rights put, when in good working-order, limits on power, that is, they demarcate what power cannot do, the realms of action it cannot pervade; on the constructive and discursive side, institutions in charge of deciding on the basis of principled and public reasons, like courts and other regulatory agencies, also flesh out the ambition of constitutional accountability.

As for the epistemic function, a variety of procedural mechanisms are regarded as appropriate to fulfil the specific task of an institution. When this task is somehow related to expertise, arrangements such as panels or committees of experts, dense mechanisms of peer review and review bodies, among others, may fit the bill. When that task is not predominantly technical and does not require specialized knowledge, then the appropriate epistemic device would probably overlap with either the democratic or the constitutional archetypes. Once again, the example of elections is illuminating: apart from its democratic pedigree, it arguably channels multiple voices and hence facilitates a better-informed collective decision. Finally, the populist function of accountability does not exactly have an institutional archetype. Since its goal is to gain the allegiance and respect from the addressees of power, whatever arrangement can foster social legitimacy would meet its central demand.

To summarise, elections and a set of other voice-giving channels signal a democratic function; mechanisms of mutual oversight, substantive standards of decency and burdens of public justification play a self-styled constitutional role; devices of information-gathering and knowledge-producing would enhance an

institution's epistemic capacities and, lastly, whatever mechanisms manage to improve the public perception of an institution would highlight a populist function.

There are further ways, however, to think about the archetypes of accountability. A supplementary point of entry to this exercise is to collect and organise the major typologies that the current literature on accountability puts forward. Ferejohn and Keohane have respectively furnished a minimalist and a maximalist typology. The contrast that can be drawn between the two is illuminating. Ferejohn offers a simple yet percipient typology, in the context of what he calls "folk democratic theory". For Ferejohn, there are two basic archetypes of accountability: *political* and *legal*. The former is practiced through silent and arbitrary voting, a crude choice that does not need to be publicly justified. Election is the main example of such a mechanism: the accountees (elected officials) are invested, assessed and removed from office without having the right to ask the account-holders to explain why they chose to remove them. Public reasons, whatever they might be, do not matter, or at least are not required of any voter. Political accountability guarantees citizen's right to capriciously say no, to vote in and to vote out with no concern for public justification. Its arbitrariness and blandness, for Ferejohn, is precisely its virtue.

Legal accountability, in turn, consists in a constraint of public reason-giving based on general norms that judges must discharge.<sup>152</sup> It fosters less caprice and more open dialogue. Under such regime, non-elected authorities, despite having tenure and being shielded from elections, bear a heavier burden of reason-giving instead. Folk democratic theory provides a proportionally inverse continuum that encloses, at each pole, a pure type of accountability: the closer to the electorate, the lesser the duty to reason; the farther away, the greater pressure to argue.<sup>153</sup> Parliaments and courts would epitomise these two poles: periodical voting by the electorate and reason-

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<sup>152</sup> The literature on the legitimacy of judicial review of legislation is an example of a blunt equation between accountability and election. The typical question that inspires much of that discussion is why "unelected and unaccountable" judges should be authorised to overrule the acts of "elected and accountable" legislators. Ferejohn (2007) rejects such flat contrast by distinguishing between accountability through "voting" and accountability through "reason-giving".

<sup>153</sup> Ferejohn explains: "A well functioning political/legal system can be expected to exhibit a range of accountability relations that runs roughly from the political to the legal or, if you prefer, from the arbitrary or wilful to the reasonable or deliberative." (2007, 10) Whereas the first pole of such continuum would present a "deliberative deficit", the other would have a "democratic deficit".

giving by judges are what prototypically characterises political and legal accountability.<sup>154</sup>

Keohane widens the compass and offers a comprehensive picture of eight accountability types.<sup>155</sup> These types, moreover, are not necessarily attached to the value of democracy. The first four derive from an act of *delegation* of powers, on the basis of which the delegator has the authority, through various means, to control the delegate. They can be *hierarchical* (the control, within organisations, exercised by superiors over subordinates); *supervisory* (a subtly milder form of control, usually inter rather than intra-institutional, by which supervisees respond to supervisors for their decisions); *electoral* (the control of elected officials by the electorate); and *fiscal* (the funding agents require certain level of information and performance from the funded agents).

The remaining four types are imbued with what Keohane calls *participation*. They assign to different actors the possibility of constraining others' decisions by having leverage, though sometimes short of formal entitlements, in the activities of others.<sup>156</sup> They can be *legal* (where agents are required to abide by formal rules and be prepared to justify their actions before courts or quasi-judicial arenas); *market* (through a diversity of principals that constrain economic agents); *peer* (by which professionals are constrained to perform adequately in the eyes of her peers); and

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<sup>154</sup> Two caveats regarding the use of the words “political” and “legal” are opportune. Firstly, the general concept of political accountability, on the basis of which this chapter was structured, seems to contradict Ferejohn’s opposition between “political” and “legal”. What I call “political”, however, is broader than Ferejohn’s conception of the term. This apparent tension can be solved by considering the concept of political accountability adopted by the chapter as a genus (political with “P”), and Ferejohn’s concept of political as a specimen of that genus (political with “p”). To be sure, law usually disciplines the procedures of election as well, but not the substantive choice of voting itself. That is why election, in Ferejohn’s terms, is a mode of political rather than legal accountability. A second caveat, which will be important for understanding Keohane’s notion of “legal” accountability below, relates to what many authors refer to as “accountability to law”. What is actually at stake, in this case, is the subjection of certain agents to the review by the quintessentially legal institution, the judge or judicial tribunal, according to legal standards. When Ferejohn talks about “legal accountability”, he is concerned with how judges and courts themselves can be held accountable, not with subjecting third agents to the oversight of judges and courts (in other words, he is talking about accountability *of* adjudication or judges, not about accountability *to* adjudication and adjudicative-type procedures, by challenging the legality of third-party decisions in courts).

<sup>155</sup> See Keohane (2002) or Keohane and Grant (2005). Stewart (2011) proposes a similar typology, although slightly more restrictive. For him, accountability has an irreducible set of elements, which involves the presence of an account-holder with formal authority to call the power-holder to account and, ultimately, to sanction her deficient or unlawful actions. Accordingly, there would be only five types of accountability mechanisms available: electoral, fiscal, hierarchical, supervisory and legal. Stewart thus deliberately excludes market, peer and reputational types.

<sup>156</sup> Keohane and Grant, 2005, 36-37.

lastly, *public reputational*, a more general pressure by which any authority feels constrained to.

These typologies are far from covering all the permutations that could be rehearsed among the accountability coordinates. They exemplify, nonetheless, the most ordinary, perhaps commonsensical, arrangements through which those functions materialise. Each overall accountability arrangement will, most of the time, pursue more than one function. Hybrid models emerge from a combination of archetypes. The extent to which this multi-functional design will be reinforcing, symbiotic and virtuously competitive or, on the other hand, malignly erosive and harmful points to the crux of the matter.

Archetypes of accountability are mental constructs that can hardly be concretely implemented in their pure form. They are optimal solutions that emerge after one applies a simplified “test of appropriateness”: the inquiry into which institutional device would be adequate to perform and excel in one single function. Such ideal solutions, however, do not conclude the work of an institutional designer. Real-world institutions, after all, are charged with overlapping rather than unitary functions.

The purposeful design of accountability arrangements, therefore, consists in balancing the plural functions each device is supposed to undertake in an overall institutional operation. Because each single device might be simultaneously suitable for one function and unsuitable for another, the “test of appropriateness” of a real institutional arrangement becomes more fallible and tentative. Philp has insightfully captured what that test amounts to. For him, the designer faces the taxing challenge of “keeping accountability clean”, that is, of “ensuring that it is used for the right purposes and ends”, as well as that it is kept “with the spirit of the institutions to which it applies”.<sup>157</sup>

## **6. Conclusion: a form in search of substance**

What exactly do we praise when we praise accountability? This question is not a rhetorical one. It should have become clear, by now, why it is worth asking. Accountability works, like other complex political concepts, as an umbrella-term for a

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<sup>157</sup> Philp, 2009, 45.



“nested set of inquiries”.<sup>158</sup> This chapter sought to present the many anxieties that accountability spurs, and put them under an intelligible and orderly expository scheme. Coordinates, functions and archetypes are the analytical lenses through which I will discuss accountability in the next chapters.

The concept of accountability, as I have tried to show, has been both under and over-signified.<sup>159</sup> under-signified, when it gets restricted to the praiseworthy types of power relationships, ignoring the spurious types and practically equating “accountable” power with “legitimate” power; over-signified, when it ends up inadvertently incorporating external political ideals.

Accountability is a formal property that might be present in some power relationships. Its semantic reach range from the slightest sort of constraint to muscular forms of power control.<sup>160</sup> Deprived of a substantive orientation, though, it tells little about why we should foster it. With no good answer as to “why” some should be held accountable to others in a particular way, accountability remains nothing but a link between two subjects, without anything intrinsically or instrumentally valuable in it. It can equally serve emancipation and domination, self-government and oppression, efficiency and inefficiency, institutional integrity and venality. Sultans and dictators, as Schmitter has reminded, or even criminal gangs and corruption schemes, are accountable in their own way, however abhorrent to us their distribution of rewards and sanctions might be.<sup>161</sup>

The attempt to render accountability an independent political ideal turns it into a rather enigmatic category, as hollow and manipulable as any buzzword that permeates low-quality political debates.<sup>162</sup> If we want more than a sound-bite, we need to dissect and identify what values lurk behind each of the claims for accountability. Their appeal is not self-standing. Rather than a substitute for political

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<sup>158</sup> Mashaw, 2006, 116.

<sup>159</sup> Bovens et al: “It is an evocative concept that is all too easily used in political discourse and policy documents because it conveys an image of transparency and trustworthiness. Moreover, ‘accountability’ often serves as a conceptual umbrella that covers various other, often highly contested, concepts.” (2008, 226)

<sup>160</sup> Example of policy documents like the World Bank Handbook: accountability can be a meta-principle, a principle or a standard (see Kingsbury and Donaldson, 2011).

<sup>161</sup> Schmitter, 2004, 48. Similarly, for Keohane, “not all forms of accountability are intrinsically democratic. It is an essential aspect of democracy, but it exists, in some forms, in all political regimes.” (2002, 1131) Rubenstein gives a similar example: “it is perfectly comprehensible to say that Hitler held his underlings accountable for failing to follow Nazi protocol.” (2007, 618)

<sup>162</sup> That is what Mashaw means when he calls accountability a “protean concept”, a “placeholder for multiple contemporary anxieties”. (2006, 115)

ideals, accountability is a technology that helps these ideals to pursue their various ends.

A purist accountability discourse would thus lack normative direction. Only a clearly fleshed-out political ideal can provide such a north. Accountable power, if not normatively qualified, does not equal legitimate power. If accountability intends to become a benchmark for legitimacy, its concept needs supplementary normative flesh. This realisation, for sure, is just the beginning, not the end of the problem. Trivial though as this claim might sound, it has not been openly conceded by many authors.<sup>163</sup>

The following chapter will further illustrate this story. The current chapter sought to craft a sharp enough question that enables the observer to capture and understand, when examining a certain institution, the absence or presence of elements of accountability and what values they might serve. In other words, it uncovers an analytical scaffolding without which accountability-talk tends to become mystifying, if not unintelligible. The following chapter, in turn, presents the key instantiations of accountability that domestic and global politics provide, their varying degrees of density and their more or less explicit alliance to higher order political ideals. Of course, one can doubt whether the enlarged conception here adopted is adequate and sufficiently enlightening for our inquiry. Yet several arguments discussed in the following chapters purport to relieve such doubts.

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<sup>163</sup> Philp has forcefully urged on the drawing of this distinction: “whether (and in what forms) an accountability relationship exists is a descriptive claim; whether we want more or less of it, or different types or additional dimensions of it, will be driven by normative commitments, and we should not run the two together.” (2009, 32)

## Chapter 2

### The context(s) of accountability

*“Accountability – or lack thereof – is a fundamental challenge confronting improved global environmental governance.”<sup>164</sup>*

#### 1. Introduction

Evaluative claims aired in the public sphere often struggle with the temptation to insert most cherished institutional qualities into a single master concept that entangles all others and simplifies the message. Nuances fade away in such an all-encompassing picture. In the light of such resounding symbol, practices and procedures are hastily praised or criticised. Accountability discourses have probably, if inadvertently, suffered from this verbal mannerism. The word has earned a flashy rhetorical influence. The concept behind it, though, recommends circumspection.<sup>165</sup> Accountability is not the summa of all legal and political virtues. It may not even be virtuous at all.<sup>166</sup>

Conceptual clarification, therefore, is an indispensable first step whenever one comes across such multiple-meaning umbrella terms. Accountability is a value-free phenomenon (or toolbox) that can manifest (or be used for) good and wicked properties (or purposes). Its neutrality partly explains its versatility and omnipresence. The first chapter set out a conceptual glossary to grasp the “grammar of accountability”<sup>167</sup> and gave us a helpful analytical orientation. It did not intend to unveil the one and only frame of mind under which it makes sense to talk about accountability, but rather to stipulate a concept that disciplines my argument. It did answer, yet quite briefly, some initial questions: What is to be accountable? What is, in particular, to be politically and legally accountable? What are the descriptive

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<sup>164</sup> Najam and Halle, 2010, 1.

<sup>165</sup> Echoing Dubnick’s (2002) distinction between “accountability-the-word” and “accountability-the-concept”.

<sup>166</sup> As Raz pointed out: “Not uncommonly when a political ideal captures the imagination of large numbers of people its name becomes a slogan used by supporters of ideals which bear little or no relation to the one it originally designated.” (1979, 210) Or as Kopell remarked: “Accountability has become a catchall for everything good in governance and administration.” (2010, 293) Or Bovens et al: “Accountability is one of those golden concepts no one can be against.” (2008, 225) To use Krygier’s words, accountability would be within the prime list of “unassailably Good Things” (2010, 1) or “hurrah words” (2007, 8) of politics.

<sup>167</sup> Mashaw, 2006, 117.

coordinates, defensible functions and discernible or historically experimented archetypes of accountability? In what ways does law relate with all this?

The current chapter pursues a rather different line of inquiry. It departs from the premise that what complicates accountability discourses is not only the multiplicity of *concepts* they imply and their more or less pronounced normative undertones, but also the various *contexts* they address.<sup>168</sup> Whereas chapter 1 indicates what accountability means in abstract, this chapter illuminates much of what it has so far meant in practice, along with the values that are built in accountability arrangements, and some of the challenges that lie ahead. In that respect, the present chapter is concerned with other sorts of questions, such as: What is for national and international institutions to be accountable? What distinguishes the international accountability mechanisms from the national ones? What explains the current anxieties with regards to the alleged accountability deficit of novel international institutions and practices? What normative expectations do they aspire to? Which new directions or reforms do they indicate?

Zooming out, and in spite of a dense interconnectedness between them, two general contexts of political accountability come forth: ‘within the state’ and ‘beyond the state’. If one zooms in, one would perceive that the state context comprises, due to the pulverisation of internal sovereignty through a broad distribution of power, an intricate chain of interlocking bodies that are accountable in multiple ways (certainly not just in the hierarchical principal-agent style). One would also realise that the ‘beyond the state’ context – traditionally depicted as a world of sovereign and autarchic political communities that may contract among themselves – is under intense transformation. It not only accommodates and sets the terms of engagement between multiple sovereigns, but also includes non-state actors that did not have any significant political weight until recently. If one gets even closer, one would further notice that the very distinction between domestic and international gets blurred at the edges and fails to grasp an evolving institutional space in between, which is not precisely grasped, however much one tries, by that categorical dichotomy.<sup>169</sup>

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<sup>168</sup> The chapter draws some inspiration, it may fairly be said, from Keohane’s and Grant’s claim: the “appropriateness and efficacy of any of our mechanisms for accountability will depend on the particular context.” (2005, 40) This is not, to be sure, an unprecedented insight, but is definitely one that straightforwardly meets the conditions for a sensible discussion on accountability.

<sup>169</sup> What Held calls “intermestic” (2004, 371), or Kingsbury et al call “distributed administration” (2005, 20).

The next section will describe how accountability, despite obvious variations, is generally organized in constitutional democracies. The third section will then describe how accountability had been somewhat settled, and currently has been disrupted at the international arena. This sequence – from ‘within the state’ to ‘beyond the state’, using the former as a departing default template for looking at the latter – replicates the expository strategy of the mainstream literature thereupon.<sup>170</sup> The dichotomy, however, is a loose one and should not obscure the presence of significant intermediary decision-making sites.

The fourth and the fifth sections will outline how that sense of ‘accountability deficit’ or ‘legitimacy crisis’ has been approached by one of the most influential legitimacy discourses that have recently surfaced: “global administrative law” (GAL). The ‘GAL project’<sup>171</sup> is one of the current intellectual enterprises that seek to understand, describe and take a critical stand on what is happening beyond the state from a legal and institutional point of view. Despite usually sharing some deep values with other reformist discourses, the GAL project has its own distinct takes and proposals. Rather than a mere terminological or peripheral disagreement, though, the project diverges from other similar enterprises with respect to (i) the remedies for current pathologies of accountability arrangements, (ii) the perception of historical feasibility of reforms and (iii) what is, at least in the foreseeable future, the most desirable model of global governance through international law.

This extensive route completes the preparatory stage of the thesis. It provides the necessary repertoire for examining three specific institutions of the Climate Change Regime. Rather than a textbook description of this large topic, or a fragmentary sample of the extensive contemporary discussion, this chapter orders and casts light on the multiple angles from which the question of accountability in

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<sup>170</sup> See Ferejohn (2007). Or as Keohane and Grant have asked: “How should we think about global accountability when there is no global democracy? How can understanding accountability at the level of the nation-state clarify the problem of accountability at the global level?” (2005, 30)

<sup>171</sup> A caveat about the meaning of ‘GAL project’ should be put forward. The expression might suggest a false image of a rigid and self-contained group of people working under a commonly shared conceptual apparatus. This first take on it, though, is inaccurate. The ‘GAL project’ is not exactly an organic and homogeneous school of thought in international law, but rather a collective initiative of scholars that are concerned with the need to conceptualise the space of administration within the overall structure of global governance. GAL is an umbrella-term that has convened authors to ask a set of crucial questions. For the sake of clarification, I will use ‘GAL project’ when I refer to this research enterprise, and only ‘GAL’ when I refer to the emergence of an institutional phenomenon that can be plausibly called “global administrative law”. This distinction will become clearer in section 5.

international and transnational law can be conceived.<sup>172</sup> This broad backdrop, despite overlooking specificities, shows whether and how GAL project is a pertinent analytical template and fruitful legitimacy discourse for the particular case-studies that follow in later chapters.

## **2. Power and accountability within the state**

Any attempt to summarise how accountability is shaped within the state, or how it operates within the self-styled constitutional democracies, needs to face the bare fact that there surely are as many variations of domestic accountability systems as there are states. The risks of parochialism, anachronism, ethnocentrism or simplistic didacticism remain behind any such effort. Yet, the opposite risk – namely, the risk of overlooking the existence of insightful commonalities and core features at a more general level – is not less disconcerting. It is true that reputedly democratic nation-states diverge immensely on how they instantiate some general devices of authority, such as electoral and participatory mechanisms. It is not less true, though, that oftentimes these particular devices are conceived and justified under strikingly similar accountability principles.

However that may be, the goal of this section is to offer a panoramic view of some basic archetypes of accountability that function within constitutional democracies, or to pinpoint what is it that they share.<sup>173</sup> I intend to describe those overall arrangements through the coordinates of accountability put forward in chapter 1, or to read the centerpieces of such architecture through those categories. To some extent, the previous chapter, by way of explaining the idea of archetypes, already kicked off the exercise that is carried on here.

The accountability project of national constitutional democracies is mainly undertaken by public law in general, constitutional and administrative laws in particular. As Mashaw reminds us, there is an “accountability project implicit in

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<sup>172</sup> For the sake of terminological clarity, it is useful to distinguish between ‘international’ and ‘transnational’ or ‘supra-national’ law even though this distinction is one of degree rather than of kind. Whereas the former captures the traditional horizontal agreements – either bilateral or multilateral – among states, the latter illuminates some thicker modes of regulating state’s behaviour. Finally, ‘global’ will be used here as a generic term that denotes either one or the other. These terminological choices do not significantly deviate from general usages of the international law literature, despite the linguistic variation that still remain.

<sup>173</sup> Kumm claims: “There is a consensus today that legitimacy of domestic law is predicated on it being justifiable in terms of a commitment to liberal constitutional democracy”. (2004, 910)

public law liberal legality.”<sup>174</sup> It is, thus, a project that resorts to hard state law, even if one can also identify elements of soft law and long-established conventions operating in the interstices.

The democratic state embodies a large chain of institutionalised accountability relationships. It comprises (i) a series of delegations and transmission-belts from the vertical point of view (typically hierarchical, principal-agent relationships), (ii) divisions of labour from the horizontal point of view (which follow some sort of checks and balances and coordination logic), and (iii) some additional sites of interaction and control from the diagonal point of view. Let me elaborate on how accountability is diffused along these three spatial perspectives.

## ***2.1 Spatial picture***

The vertical angle enables one to pick out accountability relationships in at least three spheres. First and foremost, the one established between political institutions and the people. Before anything else, the people hold authorities to account by means of democratic elections and their right to an equal vote. However, various additional participatory tools may allow individuals to intervene, directly or mediated by a third body, like a court, in the general decision-making of administrative, legislative and other judicial bodies. In these extra-electoral channels for holding authorities to account, it is usually the pressure of justification and reason-giving, intensified by transparency and contestatory tools, that purportedly compensates for the absence of election.<sup>175</sup> Some of the avenues through which one can set a vertical bottom-up relationship between the people and the officials might even be of the surrogate kind (when, for example, an organisation represents the interests of a vulnerable group of citizens).<sup>176</sup>

These sorts of arrangements are usually classified into the compartment of either constitutional, administrative or procedural law: into constitutional law due to its substantive standards to check the validity of collective decisions; into

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<sup>174</sup> Mashaw, 2006, 133

<sup>175</sup> As already seen in chapter 1, Ferejohn (2007) conceives the distinction between political and legal accountability on the basis of how close the accountee is to the people (that means, to elections). The farthest from election an authority is located, according to him, the greater its burden of reason-giving should be.

<sup>176</sup> Like, for example, public attorneys that, in some constitutional regimes, have the mandate to defend the rights of excluded or de-mobilised groups.

administrative law because of its formal requirements to constrain discretion; and into procedural law due to its formal rules that discipline the procedural steps necessary for an individual to hold an authority to account in a judicial or extra-judicial arena.

Second, hierarchical dynamics within the intrabranched sphere also underscore a vertical accountability phenomenon. From the ultimate chief of a respective branch, the chain of delegation may go downwards along several levels (like, for example, from the president to her ministries, secretaries and so on). A typically hierarchical relationship will predominantly be shaped by trust, that is, by an integrity-based rather than compliance-based accountability mechanism. The accountee, at the inferior position, usually has some minimum measure of discretion to take decisions, whereas her superior, the account-holder, can sanction her without the need for rule-based public justification.

Third, another genre of vertical relationship may be struck through devices of territorial decentralisation and sub-national entities, either in a hard form of a federation, which divides internal sovereignty into further relatively autonomous units of power, or in lighter forms of division of labour between the centre and the regionalised units. Accountability relationships, thus, are here established between a central authority that has jurisdiction over the whole territory, and the regional or local authorities with competence to act over an internally demarcated region. Techniques for dividing the competencies between the parts and the unifying whole, and further tools to adjudicate occasional conflicts that arise between these different vertical levels, are usually meant to oil the wheels of such accountability relationships.

To sum up, the vertical perspective is able to identify not only a vast array of principal-agent delegation relationships (in the two first spheres), but also a federal-like division of legislative, adjudicatory and policy-driven competencies across sub-national levels. Such competencies will be either bottom up, tracing back the ultimate account-holders to the people, or top-down, whereby higher-level authorities control the acts and assess the performance of the lower-level officials.

The horizontal angle, in turn, illuminates another type of accountability dynamics that is also widespread in constitutional democracies. Rather than a command-and-control or hierarchical way of organising power, the horizontal prism captures an element of accountability constraint in interbranch ‘checks and balances’ and other bilateral coordination mechanisms that take place at the intrabranched domain.



Horizontal accountability, in such context, may be uni-directional (when, for example, a court controls administrative acts, but the executive branch lacks any formal tool to control courts back) or bi-directional (when, for example, a court controls legislative acts, but the parliament has competence to respond and challenge judicial decisions). As for the temporal coordinate, horizontal accountability relationships may operate *ex ante*, when horizontal constraints have a bearing on the very decision the power-holder takes, may occur *ex post*, when the act of judging and sanctioning by the account-holder succeeds the decision of the power-holder, or both simultaneously in continuous circular movements.

Horizontal mechanisms solve a classic dilemma of public law that vertical mechanisms spark: how to control the ultimate guardian? By letting “overseers”<sup>177</sup> check one another, the trap of infinite regress, or of sheer absence of oversight, is circumvented. Vertical mechanisms, on the other hand, are supposed to solve the dilemma that horizontal mechanisms elicit: who settles the issue at last? By defining an ultimate, however provisional, decision-maker, the trap of infinite circularity and lack of settlement is partially relieved. It is the balance between these two spatial coordinates of accountability that help constitutional democracies to eschew, accommodate or alleviate both predicaments.

The spatial metaphor also allows us to identify diagonal accountability relationships.<sup>178</sup> The diagonal angle might approximate the working logic of either the vertical or the horizontal perspectives. A typical example of the former case is the interaction between two different federal entities in a command-and-control style (like the federal legislature defining a mandatory policy that needs to be obeyed by the executive branch of sub-national units). The latter case, in turn, is exemplified by any comprehensive public policy that needs to be pursued by the cooperative involvement of a series of agencies that cut across the federal levels.

The constitutional document, if there is one, the infra-constitutional legislation and the lower normative directives laid down by the administrative bodies themselves legally structure these accountability relationships.

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<sup>177</sup> As Thompson contends: “A completely hierarchical system of accountability is subject to a regress of authority; overseers overseeing overseers all the way up. But in the absence of a single trustworthy guardian (...) the answer must be to multiply the overseers at various levels, and allow them to check one another.” (2004, 261)

<sup>178</sup> Slightly similar to the “oblique” perspective, for Schmitter (2004, 53).

## *2.2 Legitimising the interlocking axes*

This is certainly not all that accountability at the domestic level means. Though relatively cursory, the description above should suffice for singling out the backdrop rationale of accountability within the state. Mashaw contends that “accountability regimes directed toward public governance are meant to reinforce the normative commitments of the political system.”<sup>179</sup> In order to grasp the character of a given accountability arrangement, thus, he rightly stresses the importance of unveiling the principles that undergird its overall structure, its general telos.

That chain of accountability relationships calls for a justificatory discourse in its background. How are, then, these accountability relationships justified? Actual constitutional democracies promote a normative fusion between the ideals of democracy, constitutionalism, and the rule of law. Such regimes somehow managed to interweave such diverse ideals into one institutional tissue. They strive, at one and the same time, to render political power accountable to the people, to fundamental rights, and to previously enacted and predictably enforced general rules and principles. Such entangled demands forge a legitimacy story that, however contested, has become a fairly consolidated mainstream public philosophy that underlies the current power arrangements within the state. That story cannot unfold without invoking each of those general ideals.

This is a kind of disseminated common sense, the “folk theory” in which constitutional democracies are embedded.<sup>180</sup> Regardless of the complexity to which vertical, horizontal and diagonal axes might get, they have a vital common denominator. Power has a final cornerstone, a common root that grounds it. There is a magnetic needle that pulls the claims of legitimacy towards an all-encompassing polity.

The pyramidal metaphor has been a stereotypical image to grasp how political power is understood, and its respective legitimacy basis conceived, within the state. A pyramid, for sure, misses the horizontal accountability phenomena described above. Nonetheless, it depicts the prevailing working logic. Even if there are cooperative and horizontal mechanisms along the way of intermediate decisions, the state provides for

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<sup>179</sup> Mashaw, 2006, 153.

<sup>180</sup> Ferejohn called it “folk democratic theory”. (2007, 7)

a procedural circuit that reaches a final decision (however ‘provisional’ its characterisation as ‘final’ might be). This decision, at least in a short-term perspective, settles the legal matter and is ultimately enforceable by recourse to physical coercion. And that coercion is believed to be legitimate, again, because of a justificatory logic that can be traced back to the people, rights and law within a self-constituted polity. Within the state, therefore, the cartography of political power and legal authority, no matter how complex its internal structure might be, is defined by an elemental anchor, by a single point of reference. The political and legal environment beyond the state, as so many have argued, lacks that organising centripetal feature.<sup>181</sup>

### **3. Accountability beyond the state: the mosaic of international law**

Accountability arrangements within the state lean towards an ultimate arbiter or source of legitimate power, an ultimate account-holder and accountee. That is the case not only in the complex internal design of constitutional democracies, which were exemplified above, but also in non-democratic state systems. In both cases, irrespective of whether state sovereignty is more or less internally divided, it presents itself in a compact form from the transnational point of view.

Unlike the domestic, the global context is considered “highly imperfect”, “defective” and “nonideal” for political action.<sup>182</sup> Hierarchical metaphors, like the irresistible pyramidal image, do not work. The global context, so to say, lacks the “burden of the whole”,<sup>183</sup> a transnational sovereign that carries, like the state, the ultimate general responsibility for actions, one that takes binding collective decisions and that has the power to coercively enforce them. Without a centralised government, there are a variety of power-holders who relate to each other in non-hierarchical ways. For this very reason, in such domain, “there is no single ‘problem of global accountability’; there are many.”<sup>184</sup>

I shall now proceed to explain how global accountability is structured and justified. This explanation will be made in two steps, reflecting upon two stylised

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<sup>181</sup> Walker (2008a and 2008b), Krisch (2006 and 2009), MacDonald (2008)

<sup>182</sup> Ferejohn, 2007, 1-2

<sup>183</sup> Palombella, 2012, 17

<sup>184</sup> Keohane and Grant, 2005, 41-42

models of international law. For lack of a better typology, let us call the first “Westphalian” and the second “post-Westphalian”.<sup>185</sup> This division presupposes neither a hard and fast point in time when there was a movement from one model to the other, nor the emergence of an entirely new system that supplants the old one. Nonetheless, it usefully sheds light on patterns that stray from the path of classical international law and build something distinct. It assumes that the current institutional outlook beyond the state has significantly shaken the old conceptual resources through which that landscape has been depicted, understood and warranted until recently.

### ***3.1 Old picture***

One of the customary criticisms directed against international law laments its lack of any resembling mechanism to constrain power and enforce decisions that is reputedly present in domestic systems.<sup>186</sup> International law would be essentially weak and primitive: it is followed insofar as it is convenient to, and ignored insofar as it is against state’s self-interest.

Sovereignty, in the Westphalian world, means freedom of the states to act according to their will.<sup>187</sup> A Westphalian sovereign is traditionally based on the dual concept of territoriality and autonomy.<sup>188</sup> Whenever one refers to this model of international law, one silently makes some assumptions about the international community. To begin with, the Westphalian model is state-centric: states prescribe the rules and are, at the same time, the main addressees of these rules. Each state, at least from the legal point of view, is as sovereign and independent as any other state. Every state has the ultimate right to be left alone regarding its own domestic matters, and the

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<sup>185</sup> Walker, 2010b, 18.

<sup>186</sup> Keohane and Grant explain: “The problem of abuse of power is particularly serious in world politics, because even the minimal types of constraints found in domestic governments are absent on the global level. Not only is there no global democracy, but there is not even an effective constitutional system that constrains power in an institutionalized way, through mechanisms such as checks and balances. Lacking institutionalized checks and balances, the principal constraints in world politics are potential coercion (as is the balance of power) and the need for states and other actors to reach mutually beneficial agreements. But these constraints are quite weak in restraining powerful actors, and they are not institutionalized in generally applicable rules.” (2005, 30)

<sup>187</sup> As Chayes points out, such concept of sovereignty, based on a complete autonomy of the states to act as they choose, only existed in the legal literature, never in real world. (1995, 27)

<sup>188</sup> The issue of the emergence, rise and crisis of the Westphalian model of international law is discussed by a vast literature. See Koh, 1997, 2607-2608.

power to refuse to comply with any international agreement.<sup>189</sup> Like private citizens, states contract with each other and, once they do so, they find themselves surrounded by intricate horizontal enforcement mechanisms that can be activated in case of non-compliance.<sup>190</sup> A “thin and derivative”<sup>191</sup> spontaneous order would surface from the interaction between agents that celebrate agreements according to their mutual interests.

From the horizontal perspective, therefore, there exists a system of states among themselves. Through treaty-making (either bilateral or multilateral), states make mutual promises and acquiesce to certain rules of behaviour. Treaties, indeed, may also create discrete international organisations. From the vertical perspective, however, such organisations are strictly bound by those same treaties and hierarchically accountable to the states through a principal-agent relationship. Procedures of domestic implementation, moreover, give states the chance to retain their autonomy with regards to international law.<sup>192</sup> A state’s consent to these international or thin transnational arrangements is perceived to be enough for legitimising such legal state-of-affairs.

In a Westphalian world, international law and institutions are subordinate and hence accountable to states. They are a product of states’ autonomous will. As a measure of last resort, as this story goes, sovereign states have the power to withdraw themselves from international law altogether. There is no legal impediment for them to do so. That is the doctrinal formulation put forward by international law to operationalise itself. Whether this has been and still remains a plausible and realistic account on international relations, and whether powerful and weak states have had even-handed means to exercise such autonomy, are other types of problems, as we shall see.<sup>193</sup>

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<sup>189</sup> Article 2 (7) of the UN Charter contains this idea of a state being inviolable with regards to its domestic matters: “Nothing contained in the present Charter shall authorize the United Nations to intervene in matters which are essentially within the domestic jurisdiction of any state or shall require the Members to submit such matters to settlement under the present Charter; but this principle shall not prejudice the application of enforcement measures under Chapter VII.” See Slaughter, 2004, 283.

<sup>190</sup> For Koskeniemi, it is a “system of contractual obligations between independent states declared at Westphalia”. (1991, 397)

<sup>191</sup> Walker (2009).

<sup>192</sup> Krisch, 2010, 246-249. Kingsbury et al. argue: “In classical theory the domestic regulatory measures are the implementation by states of their international obligations. Private actors are formally addressed only in the implementation stage, and that is solely a domestic matter.” (2005, 23)

<sup>193</sup> Ferejohn, 2007, 2.

### 3.2 *New picture*

The development of international law and institutions during the second half of the 20<sup>th</sup> century has reshaped this forthright picture. There has been a perceptible transition, analysts claim, from a classic model of international cooperation (by means of conventional bilateralism or multilateralism) towards more intrusive modes of supra-national decision-making.<sup>194</sup> The world is in the process of becoming, to an already observable extent, post-Westphalian, and states, rather than sovereign agents (whatever that has genuinely meant), gradually turn into what one could label as, in the absence of a more precise name, “post-sovereign”.<sup>195</sup>

This diagnosis points to a different global scenario of power and institutions, which comprises relevant non-state actors alongside states. It apprehends a shift from a state system to a multi-actor system of international relations. Cohen and Sabel have already discerned such recent phenomenon: “something new is happening politically beyond the borders of individual states and irreducible to their voluntary interactions”.<sup>196</sup>

To say that the state is just *one actor among others*, rather than *the actor* of international law is certainly, as yet, an overstatement. Although the state is not withering away, its political and legal centrality slowly gets attenuated.<sup>197</sup> That sounds frightening because of what it practically means and normatively implies: power may have gradually slipped from the terrain which tends to be most public, visible, accessible and controllable, and has shifted, or has been gradually moving, towards an area that seems to be more technocratic, paternalistic and distant, definitely less familiar to us.

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<sup>194</sup> Zürn (2004).

<sup>195</sup> Several authors have been using the prefix “post” to refer to the current international state of affairs: “post-sovereign” and “post-Westphalian” are usual ones. For the former, see MacCormick, 2001, 123; for the latter, see Fraser, 2005, 73, and Walker, 2008a, 373. There are also alternative labels. Abram and Antonia Chayes, for example, refer to a “new sovereignty” in order to explain that sovereignty, instead of granting states the freedom to act as they wish, requires that they make compromises in order to honour their role as members of the international community. According to them, “the only way most states can realize and express their sovereignty is through participation in the various regimes that regulate and order the international system”. (Chayes and Chayes, 1995, 27)

<sup>196</sup> Cohen and Sabel, 2006, 763.

<sup>197</sup> Cassese goes in that direction: “The centrality of the state to the notion of public powers has become an optical illusion. This does not mean, however, that the global legal order has supplanted the state, nor that it has become dominant, inasmuch as it is also through global regulatory systems that domestic public powers are able to make their voices heard.” (2006a, 673)

Although one can rightly claim that the backbones of the Westphalian rationale are slightly breaking down, two important caveats deserve our attention. The first concerns the nature of this shift. The emergence of the post-sovereign model of international law does not imply the disappearance or entire overhaul of the Westphalian model.<sup>198</sup> The former model refers to a conceptually loose way to capture more complex institutional arrangements that place themselves over and above the conventional horizontal agreements that remain valid anyway. Such arrangements, though, fall below the radar screen and are inaccurately detectable through Westphalian categories.

The second caveat, which springs from the first, is that the binary and stylised distinction between the sovereign and the post-sovereign models lacks refinements that other classifications attempt to rectify. Koh, for example, gives a more detailed account of the changes of international law and furnishes a more intricate periodisation.<sup>199</sup> Walker, in turn, draws a larger picture of the “global legal configuration”.<sup>200</sup> Weiler, finally, looks at three specific periods (1900-10, 1950-60, 1990-2000), and respectively recognises three command modes in international law: transactionalism, community and regulation.<sup>201</sup> For him, one cannot talk about revolutionary transformations, “but of layering, of change which is part of continuity, of new strata which do not replace the earlier ones, but simply layer themselves alongside.”<sup>202</sup> This geological metaphor symbolises the superposition of different kinds of institutional structures, each of which with a distinct capacity of autonomous

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<sup>198</sup> As Jose Alvarez has claimed in a public lecture: “We are still living in Westphalia. States are still very much alive and the trickle-up effects show this.” (Edinburgh Lecture, May 2011) Koskenniemi also asserts the “continuing vitality of statehood”. (1991, 397)

<sup>199</sup> Koh, 1997, 2604-2634.

<sup>200</sup> Walker, 2008a, 373.

<sup>201</sup> In Weiler’s words: “The ways and means of international norm setting and law making, the ‘modes’ in which international law commands, are so varied, sometimes even radically so, that any attempt to bring them into the laboratory of democracy as if belonging to a monolithic species called ‘international law’ will result in a reductionist and impoverished understanding of international law, of democracy and of the actual and potential relationship between the two”. And Weiler continues: “Much can be gained, in this context, by conceptually unpacking international law or the international legal system into different co-existing ‘command’ modes: International law as Transaction, international law as Community, and international law as Regulation. Each of these modes presents different normative challenges, entails a different discourse of democracy and legitimacy, and, eventually, will require a different set of remedies. What is critical is that I will refract each of these command modes as an instance of Governance which, thus, requires some form of legitimation.” (2004, 552)

<sup>202</sup> Weiler, 2004, 551.

decision-making and a specific legitimacy burden, and thus helps us better grasp the plurality of existing arrangements in international law.

To sum up, we have witnessed a multiplication of atypical sites of global decision-making. The alleged novelty of these sites is a product not only of a *horizontal expansion* of new domains but also of the *vertical incisiveness* of transnational norms. As the explanatory narrative advances, in order to overcome international coordination hurdles that come up when state interests do not converge, international law was asked to stretch its authority along the horizontal and vertical coordinates: it has gained width as it pervades new subjects (previously treated by domestic jurisdictions alone) and depth by stronger modes of subordination and enforcement. The natural effect of these movements was the mitigation of sovereignty and of its legal corollary – the principle of consent.<sup>203</sup> More than a monolithic system of autonomous states entering into horizontal agreements with one another, these new sites compose a more heterogeneous environment. A “mosaic”<sup>204</sup> or a ‘patchwork’ are images that better express the phenomenon and allow this theoretical effort to better apprehend the components of that landscape.

Although one can claim that the national sphere is still the overriding domicile of political power, the scale of new functional demands has largely surpassed the walls of that domicile. A suitable example comes from the area of human rights. There is a fair consensus among scholars that we are now experiencing a post-Westphalian era in international law of human rights.<sup>205</sup> Since the end of the Second World War, states cannot embrace a theory of sovereignty understood as the freedom to eliminate dissidents, or to allow the massacre of its own people according to faith or political convictions.<sup>206</sup> The UN Security Council has repeatedly declared that

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<sup>203</sup> Kumm describes the transformations suffered by international law with respect to its scope, to its enforcement measures and to state consent (2004, 913-916). In the same sense, Weiler also talks about “the widening and deepening in the scope of the international legal order”. (2004, 561)

<sup>204</sup> The point of the mosaic metaphor has been well characterised by Walker, Tierney and Shaw (2011).

<sup>205</sup> See Henkin (1999), Slaughter (2004), Kahn (2000).

<sup>206</sup> Henkin holds: “The international human rights movement, born during the Second World War, has represented a significant erosion of state sovereignty. And it took Hitler and the Holocaust to achieve that. Since 1945, how a state treats its own citizens, how it behaves even in its own territory, has no longer been its own business; it has become a matter of international concern, of international politics, and of international law.” (1999, 4)



violations against humanitarian law constitute “threats to international peace and security”.<sup>207</sup>

International law of human rights is built upon the idea that individuals, not states, are at the centre of its normative claims.<sup>208</sup> It represents an extension from a “doctrine of state relations to a regime of individual rights”.<sup>209</sup> This feature of international law of human rights, at least theoretically, has a clear impact on traditional sovereignty. Rather than a “dark picture of the condition of state sovereignty”,<sup>210</sup> one perceives a mode of authority that cannot claim to enjoy total independence from the international community, a mode of authority that is sensitive to rights and interests other than the states’ own interests. This phenomenon is definitely not restricted to the field of human rights, and it calls into question some premises on the basis of which traditional international law, rightly or wrongly, was accepted as legitimate.

### ***3.3 Legitimising the mosaic and the sense of crisis***

The Westphalian era stabilised a legitimacy theory attached to states and subordinated the authority of international law to states’ consent. Traditional international law, therefore, had a shorthand answer to the question of whether and how international institutions of that kind are accountable: through state’s consent, a principal-agent transmission belt is set up, that is, the state delegates to international organisations non-discretionary power and would keep intact its sovereign power while subjecting itself to international rules.

This rationale became outdated. New configurations of authority, as it happens, do not fit well into the traditional legitimising discourse anymore. They have, thus, been challenged by new demands of accountability. These two “moving

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<sup>207</sup> This statement has triggered Security Council’s power to intervene, under article 44, Chapter VII of the UN Charter. See also Security Council’s Resolutions, especially Resolution 836, adopted by the Security Council at its 3228<sup>th</sup> meeting, on June 4<sup>th</sup> 1993 (Bosnia and Herzegovina). In a similar tone, paragraph 139 of a Resolution adopted by the General Assembly in a World Summit in 2005 affirms that: “The international community, through the United Nations, also has the responsibility to use appropriate diplomatic, humanitarian and other peaceful means, (...), to help to protect populations from genocide, war crimes, ethnic cleansing and crimes against humanity.” A/RES/60/1 (24 October 2005).

<sup>208</sup> See Kahn, 2000, 11.

<sup>209</sup> Kahn, 2000, 5.

<sup>210</sup> Henkin, 1999, 5.

targets”,<sup>211</sup> namely, the new institutional forms and the new accountability demands, are still in search of accommodation. In the light of more complex and autonomous transnational institutions that originated in the last decades, accountability through state consent became fake and unwarranted. To the extent that these new kinds of transnational institutions distance themselves from that original act of state consent, the respective legitimising discourse calls for re-elaboration.<sup>212</sup>

This is not to deny that state consent remains a pivotal component of a substantial part of international law’s legitimacy. Consent, however, can hardly be seen as the sole one anymore. Insofar as new regimes start to have the ability to bind states even against their will, one cannot be entirely satisfied with consent doing the whole legitimising work that in the past was done by thicker sorts of authority.<sup>213</sup> Each layer of international law, as Weiler contends, has a different “charge of legitimation”. When a disquieting portion of international law escapes state’s oversight or control and thus deviates from the conventional frame of legitimation, when some slices of state autonomy erode by virtue of an international regime that is too costly to opt out, the appeal to sovereignty becomes too theoretical, overly impractical and unrealistic. Or worse: it is utterly unable to justify what is happening, does not accord to basic standards of legitimacy and ends up leading to an accountability deficit.

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<sup>211</sup> Weiler refers to international law and legitimacy as “two moving targets”. (2004, 548)

<sup>212</sup> Addressing international environmental law, Bodansky affirms: “Apart from a few regimes (...), state consent and legality have provided until now a relatively firm foundation for international environmental law. But two developments are likely to undermine their ability to do so in the future. First, the coming generations of environmental problems will probably require more expeditious and flexible lawmaking approaches, which do not depend on consensus among states. Second, to the extent that international environmental law is beginning to have significant implications for non-or substate actors (which have not consented to it directly), rather than just for the relations among states, state consent may for them have little legitimating effect.” (1999, 606) See also Weiler, 2004, 548; Henkin, 1999, 5.

<sup>213</sup> Chayes and Chayes, among others, have asserted that the legitimacy of governance regimes lies predominantly on the open process of norm elaboration and application and not only on state consent: “even if the state may be said to have consented to the text of the treaty, that doesn’t carry very far if the meaning of the text depends significantly on the relatively open process of norm elaboration and application (...). It may be argued that these processes of interpretation and supplementary norm creation are legitimated by the consent of the state in adhering to the treaty in the first place. But (...) such imputed consent is less persuasive as a legitimator of outcomes if the procedures turn out to be unfair in operation.” (1995, 128-129) It is also the point of the “paradigm of human rights”, on the basis of which Kahn argues that international law can be legitimate even in the absence of consent: “The international law of human rights rests on more than the positivist conception of the origins of law. We are, after all, most concerned with applying human rights law against non-consenting regimes. We do not think a state has the option of withdrawing its consent from such norms.” (2000, 5)

Transmission-belt concepts, therefore, have lost their grip to ground international organisations that can hardly be seen as mere agents with a clearly defined mandate. Rather than agents of states, these organisations can be considered as trustees. Rather than principals, states become actual trustors. And these trustors, in some situations, cannot even sanction the trustee when they do not agree with the latter's decisions.

For the 'post-sovereign layers' of international law, legitimate accountability is still an open and deeply disputed question. It has been a widespread belief that several existing organisations are being accountable to the wrong constituencies, by the wrong reasons and procedures.<sup>214</sup> Their legitimacy, thus, remains in doubt.

Devising pathways for accountability improvement and legitimacy promotion is the ultimate aspiration of a series of academic and practical endeavours. These projects purport first to theorize about and then to implement what is deemed to be a rectification of current institutional flaws. In the following section, I will approach one of these available pathways and briefly contrast it with some alternatives.

#### **4. Between adaptation and invention: the quest for accountable global governance**

One hardly denies that public power, wherever it comes from, should be duly accountable – or, according to the aforementioned normative ambitions, to face limits, to be inclusive, to display proficiency and, eventually, to enjoy the respect of its subjects.<sup>215</sup> Nowadays, it is rather uncontroversial that a power arrangement should fulfil the constitutional, democratic, epistemic and populist demands for legitimate accountability, however combined and in whatever specific form and depth those charges are deemed appropriate in each site of public power.

This claim, though, needs to be voiced with care. After all, accountability might do harm as much as it might do good. If accountability, in line with the broad

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<sup>214</sup> Krisch argues that: "the problem is that these institutions are often accountable in the wrong way: in part, they are accountable to the wrong constituencies". (2006, 250) Keohane and Grant go in the same way: "The problem is not a lack of accountability as much as the fact that the principal lines of accountability run to powerful states, whose policies are at odds with those of their critics, and which may or may not themselves be fully democratic. Public within countries are not heavily involved in these processes." (2005, 37)

<sup>215</sup> Held and Koenig-Archibugi, for example, claim: "the conception of political legitimacy prevalent in most countries today is hostile to the idea of any form of power that is unaccountable to those over whom it is exercised and especially to those who are most affected by it". (2005, 1)

definition here adopted, turns out to be almost everywhere in social and political relations, any quest for it turns out to appear redundant and dispensable. Its ubiquity, nonetheless, does not turn such a quest futile: as argued in the previous chapter, there are more and less justifiable accountability arrangements. Winnowing the wheat from the chaff, thus, requires attention to contextual nuances.

When we restrict our appeal for decent politics to an evasive invocation of accountability *tout court*, we risk losing sight of what makes accountability desirable and beneficial in the first place.<sup>216</sup> If the plea for accountability is going to be attractive, it cannot turn a blind eye to some minimal traces of the good old political ideals – those values, symbols and institutional practices to which we have tended, in modernity, to ascribe allegiance.<sup>217</sup> Without them, accountability is just an empty container that structures and explicates a bilateral or multilateral power-relationship. Such a relationship is not presumptively valuable for its own sake. Some substantive normative view, thus, must flesh out this skeleton.<sup>218</sup>

This methodological caution is not usually explicit in recent accountability literature. If the concept of accountability has any critical role to play (that is, to aid the assessment or reform of current institutional arrangements), it has to earn adequate normative traction. That is not derived from the idea of accountability itself, but from exogenous normative inputs. Turning power accountable is a misleading and superfluous enterprise most of the time. Turning power *appropriately* accountable is not.

How should one understand, then, the demand of accountability directed towards the so-called ‘post-sovereign’ transnational institutions? What are the adequate conceptual and contextual standpoints from which that question can be answered?

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<sup>216</sup> As Philp maintains: “simply asking for more accountability is unlikely to contribute much to resolving the deep inequalities of power and wealth that systematically weaken the legitimacy of global institutions.” (2009, 47)

<sup>217</sup> MacDonald and Shamir-Borer, 2008, 3; Búrca (2007).

<sup>218</sup> Krisch, by acknowledging that “most institutions of global governance” are somehow accountable, pins down the specific notion of accountability that GAL needs to advance: “The problem with these institutions is, then, not an absolute accountability ‘deficit’, to be overcome by improving or strengthening accountability mechanisms in a technical exercise. Rather, the problem is that these institutions are often accountable in the wrong way: in part, they are accountable to the wrong constituencies.” (2006, 250-251) Therefore, knowing ‘to whom’ someone should be accountable is a crucial design choice, the answer to which can hardly be ‘to everybody’ or ‘to anybody’.

The state has been the centre of gravity of political imagination in modern times, a necessary part of our political cognitive horizon. It provided the primary boundary of a political community. The ruling ideals of democracy, constitutionalism and rule of law, as has been contended earlier, have all been (re)conceived within its frame.<sup>219</sup> It is still the default vantage point of political argumentation and the ordinary locus of everyday political action. It stands as the chief reference of individual self-identification, political membership and loyalty. Pre-modern political ideals, not originally connected to states, happened to be envisioned under their mantle and became normalised as sides of the same coin. This is a contingent conceptual operation that produced a legitimating toolbox for the state through a variety of accountability arrangements. Let me call it ‘state-centred conceptualisation’ or, as some call it, “methodological statism”.<sup>220</sup>

In that light, when we move to the transnational legal-political sphere, an immediate question arises: what normative framework should travel to this variegated environment? Constitutionalism, democracy, rule of law or, as far as possible, all of them together? Both scholars and institutional designers have been struggling to test the transferability of this state-based legitimating toolbox (its built-in concepts, institutional devices and analytical lenses). When it comes to the transnational sphere, a cacophony of ideals envelops the calls for accountability. They act like magnets that evoke a cluster of values and aspirations, more or less envisaged in, or requested from, existing international institutions.

It is not simple to get rid of the state-centric analytical baggage.<sup>221</sup> Neither is it necessarily commendable to pursue that path.<sup>222</sup> The default methodological statism of international relations and international law is anything but pointless. It should, thus, be treated as worth accommodating, as a hurdle to be faced, not rejected.<sup>223</sup> It

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<sup>219</sup> Dyzenhaus, 2011, 23-24.

<sup>220</sup> Chwaszcza, 2008, 132.

<sup>221</sup> As Stein eloquently puts it: “we still insist on translating solutions developed within the state to the novel phenomenon and using state nomenclature. This, in a sense, is a natural tendency since the state is, so to speak, the only show in town if one looks for a model and international law is of little help.” (2005, 1)

<sup>222</sup> For Rosenau, one has to break such “stranglehold”: “Perhaps the most dangerous trap involves what I call the ‘domestic analogy’: the tendency to think about the problem of accountability at the international level as if we had domestic processes in mind. (...) Does this mean that transnational accountability cannot be achieved? No, it does not if one can break free of the stranglehold that the domestic analogy has on our thinking.” (2001, 353-354)

<sup>223</sup> Krisch’s arguments echo this perception: “When we try to imagine the postnational space, it is not surprising then that we turn for guidance first to the well-known, the space of the national.” (2008, 1)

creates a sort of theoretical path-dependency, an unrelenting yet unsurprising cognitive bias: in order to conceive of accountable global governance, one would have to build upon state categories and institutions. The state still counts as the benchmark from which we depart (either to replicate or to innovate). The most refined and experimented elements of our institutional technology derive from that ground.

At the domestic level, as I argued, the archetypes of each function are relatively consolidated. At the very least, their basic contours are widely disseminated. Free electoral competition, checks and balances, several principal-agent transmission-belts, insulated and impartial judicial oversight and rights protection: no political regime has been able to claim legitimacy or to earn the admiration and respect of the international community if not internally structured around these core institutional features. That set has become the threshold test to enter the ‘club’ of constitutional democracies.

At the global level, the archetypes of each accountability function, mainly for reasons of magnified scale and deeper societal pluralism, are harder to replicate through identical mechanisms. Other mechanisms, though, might be available without necessarily disfiguring or abandoning those functions. There, the democratic function would entail, at the very least, the participation of the less powerful countries as well as of any affected communities and individuals in the relevant decision-making bodies; the constitutional function, to be credible, would have to mitigate the power of the most powerful, reduce asymmetries and re-equilibrate the arms; the epistemic function would have to be instantiated by the creation of competence for dealing with the problems of a global community; the populist function, finally, means gaining the allegiance of the multiple actors that interact in this sphere.

How should these functions be implemented in institutions of global governance? Ingenuity, for Keohane and Grant, is more important than a “single-minded and mechanical application of the ideals of democracy.”<sup>224</sup> If one resolves to follow such common sense advice, one can conceive of two remedies for the obsolescence or unfitness of the state-based conceptual and procedural repertoire: on the one hand, one can invent a new one; on the other, rather than simply emulating, one can update, revamp and reconstruct the old one. Furthermore, in order to reach

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<sup>224</sup> Keohane and Grant, 2005, 41.

the desired destination, one can also plan the timing and rhythm of change, with different degrees of incrementalism .

How to infuse the transnational agencies of decision-making, either regional or global, with the technology of good government (or governance)<sup>225</sup> that modern states are supposed to have developed? Is there a need for an entirely new equipment, or should the domestic one just be transposed?

The most influential discourses for legitimate global governance have been crafting a middle-ground between these two poles. In the course of this attempt to reconceptualise state-based references, it does not come as a surprise that the constitutional and administrative law registers at the domestic level appear as primary inspirational candidates for the reform and legitimation of transnational governance.

Recasted as ‘global constitutionalism’ (GCon) and ‘global administrative law’ (GAL), these two “efforts of translation”<sup>226</sup> depict and critically probe what is going on beyond the state from the political and legal points of view. Rather than readymade compulsory blueprints, domestic constitutional law and administrative law make up the level playing field for GCon and GAL.<sup>227</sup> Both are concerned with the exercise of public power outside the purview of the state, and convey more or less divergent proposals about how far international institutions should reach and what the available and feasible historical routes towards such destinations are. They somewhat fill up, from their own standpoints, the four functions of accountability – with different perspectives on what has to be changed, when and in what magnitude. This dissertation will engage with the GAL’s framework more intimately, for reasons that

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<sup>225</sup> The distinction between “government” and “governance” has been serving to identify, respectively, thicker and thinner modes of the exercise of authority. States are the typical sites of “government”, whereas various transnational institutions are described as part of “global governance”. Krahman puts that shortly: “government and governance as ideal-typical poles at either end of a continuum ranging from centralization to fragmentation permits an analysis of the transformation of political authority at the national, regional, and global levels.” (2003, 340) Finkelstein summarises it: “Global governance is governing, without sovereign authority, relationships that transcend national frontiers. Global governance is doing internationally what governments do at home.” (1995, 369) Esty connects global governance more closely with law: it is the group of legal processes and institutions, either public or private, that manage international problems and address the respective collective decisions’ demands. (2005, 1497) See also Stoker (1998) and Krisch (2010).

<sup>226</sup> Krisch, 2010, 245.

<sup>227</sup> For Krisch, domestic administrative law comes as “inspiration and contrast: it serves as a framework for identifying converging and diverging developments in institutional practice, and it helps us sharpen our sensitivity to the problems and possibilities of establishing accountability mechanisms on the global level.” It is a “background rather than basis for prescription”, it aids the “reflection on the transferability of domestic concepts”. (2010, 256-257)

will become clearer, as we go along. The current section helps to locate and estimate the precise aspiration of GAL project's account of global governance.

## 5. "Global administration" in the search of a "global administrative law"

The departing insight of the 'GAL project' is that much of contemporary 'global governance' should be conceived as 'global administration'.<sup>228</sup> According to the project proponents, the concept of global administration is drawn by exclusion. It comprises all norm-generative practices that are not strictly legislative, like treaty-making, and all dispute settlement procedures that are not strictly judicial, like international adjudication. It consists, in turn, of quasi-legislative rulemaking and quasi-judicial adjudicative functions.<sup>229</sup> The boundaries of each function, just as it happens in domestic law, are indeed loose and volatile. The 'quasi' demarcation, nevertheless, conveys an attempt to apprehend the varying conceptual degrees and institutional forms through which these core public functions are manifested.

The exact nature of 'global administrative action', thus, is first defined by what it is not. It basically falls short of the highly contested, vocal and politicized treaty-making events or judicialized dispute settlements. However, global administration – an institutional reflection of the administrative burdens generated by growing global inter-dependence – is not yet "global administrative law".<sup>230</sup> The former corresponds to an increasing institutional reality, whereas the latter is, first and foremost, a normative call, if not an embryonic set of procedural tools that are 'emerging' in different sites of global public power. The modest "rhetoric of emergence"<sup>231</sup> indicates a circumspect yet faithful portrait of what decisional processes are in place, but, at the same time, a confident normative ambition with respect to where these processes should go. That is why, for sure, this literature

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<sup>228</sup> Kingsbury et al., 2005, 17, Krisch, 2010, 255. MacDonald claims that: "much of global governance can be understood and analyzed as administrative action", which is the "argumentative platform of the entire project". (2008, 4). As Cassese also points out: "Administration is becoming increasingly international. (...) Their number is increasing (...). Their staff is growing (...). Their influence is on the rise." (2006b, 2)

<sup>229</sup> Kingsbury et al.: "As a matter of provisional delineation, global administrative action is rulemaking, adjudications, and other decisions that are *neither treaty making-making nor simple dispute settlements* between parties." (2005, 17)

<sup>230</sup> This idea has been captured in three general statements of MacDonald: "Global *administrative law* doesn't exist. (...) Global *administration* exists. (...) Global *administrative laws* exist." (2008, 2-4)

<sup>231</sup> MacDonald, 2008, 2. Kingsbury et al. (2005).



introduces itself as an ‘advocacy project’,<sup>232</sup> not only as a radiography of contemporary global governance. It is an analytical enterprise as much as the product of a mobilisation for institutional change. Not only an intellectual, but, as far as possible, a practical advocacy project.

The project’s inaugural article<sup>233</sup> starts off with a meticulous taxonomical effort to map and understand the “institutional topology”<sup>234</sup> of contemporary global regulatory governance. That taxonomy allegedly helps us acknowledge and understand some blind spots that conventional categories of international law overlook. In other words, relevant international bodies operate below the radar screen of grand and highly visible events of transnational decision-making. Global governance, the argument continues, comprises not only (i) traditional inter-governmental institutions, but also (ii) transnational horizontal networks between national regulatory officials, (iii) distributed transnational administration between national regulators, (iv) hybrid inter-governmental-private institutions, and (v) private bodies.<sup>235</sup> Each type exercises more or less authoritative power at the global level and impacts on both domestic policies and non-state actors.<sup>236</sup>

Within this global administrative space, complex interactions are forged between the global bodies and the addressees of their regulations. Among the addressees we find states, individuals, private companies and NGOs. The global administrative space is autonomous and distinct from the spaces governed either by international law or domestic administrative law.<sup>237</sup> The GAL project tries to capture this institutional configuration that runs alongside the confines of classical international law. It conceptually ties up a web of cross-cutting transnational decisional bodies that has been increasingly constraining all sorts of actors in the transnational arena.

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<sup>232</sup> For MacDonald, GAL is “not simply identifying the emerging principles, but advocating their spread.” (2008, 27-28)

<sup>233</sup> Kingsbury et al. (2005).

<sup>234</sup> MacDonald and Shamir-Borer, 2008, 6.

<sup>235</sup> Kingsbury et al., 2005, 21-22. One can mention several representative examples of each type: (i) the UN Security Council or the International Labour Organization (ILO); (ii) the Basel Committee on Banking Supervision; (iii) several national environmental regulators which implement international environmental law; (iv) the Codex Alimentarius Commission or the Internet Corporation for Assigned Names and Numbers (ICANN); (v) the International Standardization Organization (ISO) or the World Anti-Doping Agency.

<sup>236</sup> Kingsbury et al., 2005, 23-24.

<sup>237</sup> Kingsbury et al., 2005, 26.

These global bodies have jurisdiction over topics as diverse as the issuance of commodities, the management of refugees' camps, the declaration of a state's non-compliance with its agreed obligations, the sanctioning of individuals, the establishment of standards and certification requirements and so forth. To recall Weiler's typology, which maintains that contemporary international law revolves around three overlapping geological strata (transactionalism, community and regulation), GAL project would be mostly concerned with two attributes of the third layer: the increasing importance of the administrative part of treaties and the development of cooperative policies that used to lie within the jurisdiction of states' administrative apparatus.<sup>238</sup> Still, the project's framework transcends that typology by including hybrid and private bodies.

Together with this large descriptive and classificatory endeavour, the project has an evaluative and prescriptive prong, which spells out the normative repercussions of global administration. This dimension of the project consists in a programme for institutional reform 'writ small', aiming at legitimising accountability arrangements of institutions beyond the state. Rather than proposing macro-structural reinvention, that is, institutional design 'writ large',<sup>239</sup> the project addresses micro procedural variables that would enhance accountability at the margins. This task is equally important to and more quickly achievable than its macro-structural counterpart.

If one attempts to catch a comprehensive view of the academic literature that the GAL project has so far produced, one would see at least three things: (i) a descriptive framework, as the one depicted above, (ii) a general normative stance for accountable global governance and, lastly, (iii) a large set of case-studies that somewhat combine both prongs – the descriptive and the normative.<sup>240</sup>

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<sup>238</sup> These two characteristics have been described by Weiler, 2004, 559.

<sup>239</sup> The distinction between institutional design 'writ small' and 'writ large' has been carefully developed by Vermeule. His analysis takes for granted the broad historical constraints of some structural elements of institutional choice, and focuses on "a repertoire of small-scale institutional devices and innovations that promote democratic values against the background of standard large-scale institutions." (2007, 2) Ely, when delving into the role of judicial review, also draws a similar distinction between "process writ small" (individual disputes) and "process writ large" (the broader conditions of participation in government). (1980, 87)

<sup>240</sup> The case-studies published under the heading of the GAL project are numerous and include the examination of multiple institutions that exercise global governance. A short list of primary references would have to include: Krisch (2006) (on the regulation of genetically modified organisms); Stewart and Sanchez (2009) (on the World Trade Organization); Kingsbury and Schill (2009) (on investment law and arbitration); Kingsbury and Donaldson (2011) (on the World Bank Handbook for assessing

In what follows, I will further elucidate the particular features of such normative prong of the GAL project, which is crucial for the purposes of this thesis. I organise this elucidation around three questions that the project has been trying to answer: (i) why does global governance have an accountability deficit; (ii) what would be, at least for the time being, appropriate accountability for that domain; (iii) what would be, under present circumstances, the feasible alternatives. This threefold expository order helps specifying exactly how the GAL project differentiates itself from other accountability discourses that have so far been set forth.

### ***5.1 A diagnosis of accountability deficit (or inappropriateness)***

Problem-solving demands that were traditionally dealt with by domestic legal machinery are shifting away from the state and sliding towards transnational centres of decision-making. Many of these centres, as pointed above, are located under or above the conventional corners of classical international law. This phenomenon certainly sparks serious misgivings. Mashaw, for example, perceived the difficulty of justifying bodies that are “outside domestic processes of political accountability, yet weakly policed by a still patchy international political and legal order.”<sup>241</sup> He is worried about a power arrangement that is still rudimentary when compared to a reputedly more mature structure of accountability, like the one that is typical of states.

The GAL project has the same unease with this “patchy and weakly policed” order. Like many other intellectual efforts directed to rethink global governance, the GAL project tackles the accountability deficit that springs from the fact that “transnational systems of regulation or regulatory cooperation” have expanded in “reach and forms”.<sup>242</sup> These systems have become increasingly intrusive and, in some cases, directly regulate the behaviour of multiple actors without having to resort to states to implement their rulings. Rather than being mechanical agents of states, these

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infrastructure regulation); Shamir-Borer (2006) (on the International Organization for Standardization); Barr and Miller (2006) (on the Basel Committee on Banking Supervision).

<sup>241</sup> Mashaw, 2006, 115

<sup>242</sup> Kingsbury et al., 2005, 16.

institutions exercise a significant measure of “de facto independence and discretion”.<sup>243</sup> Examples of this practice abound.<sup>244</sup>

This sense of accountability deficit is prompted, therefore, by the realisation of the fact that these bodies are controlled neither by states nor by any other sufficiently legitimate actor or process.<sup>245</sup> Following that perception, the GAL project aims at turning global administration accountable in its own particular way, that is to say, through the infusion of traditional administrative law principles into the processes of such global bodies. To be sure, this distinct institutional setting strays from the logic of domestic administrative law. Whereas the domestic environment, as it has already been contended, is geared to an authoritative apex (an ultimate constituency to which administration is subordinate), global administration lies outside the delegation-belts of the states.<sup>246</sup> Although global bodies are not free-floating entities, they still remain, as yet, insulated against what the GAL project deems as ‘appropriate’ accountability.

## ***5.2 A modest and sectorally sensitive proposal on appropriate accountability***

The normative prong of the GAL project considers whether and to what extent administrative law mechanisms are able to reduce or fix the accountability deficit explained above. As a matter of fact, Kingsbury et al. observe that procedural mechanisms of that sort are already being implemented as a response to that charge.<sup>247</sup> The “rhetoric of emergence”, thus, refers to something that is not just an

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<sup>243</sup> Kingsbury et al. contend: “the global administrative bodies making those decisions in some cases enjoy too much de facto independence and discretion to be regarded as mere agents of states”. (2005, 26)

<sup>244</sup> Kingsbury et al. enumerate examples like the certification of CDM projects by the Executive Board, the determination of refugees’ status by the UNCHR, the certification of NGOs to participate in meetings by U.N. agencies. (2005, 24)

<sup>245</sup> That is what Zürn highlights when he points to the “removal of numerous decisions from the circuit of national and democratic responsibility”. (2004, 260)

<sup>246</sup> As contended by Cohen and Sabel, 2006, 765. This point has been also raised by Stewart (2005a) and by Kingsbury et al.: “Domestic administrative law is (...) still built around a core of command-and-control administration – of rules and decisions binding on private actors, emanating from a defined administrative entity. In global administration, no such core typically exists”. (2005, 53) Krisch also notes that the claim that delegation and control are touchstones of accountability in global governance bear “limited promise” for at least three reasons: first, when founding treaties contain no more than vague directives, delegation becomes thin and elusive; second, when outsiders to the treaty are, nonetheless, directly or indirectly affected by transnational decisions, delegation fails to do any legitimacy work; finally, when there are multiple principals, the possibility of state control is not only meagre, but also undesirable due to the risk of stalemate and collective inaction that anything similar to veto powers would bring about. (2010, 247-248)

<sup>247</sup> For Kingsbury et al., the accountability deficit “has begun to stimulate two different types of responses: first, the attempted extension of domestic administrative law to intergovernmental

aspiration, but an actual phenomenon.<sup>248</sup> In the face of growing criticism, global bodies are opening themselves, if not to a complete overhaul of their very institutional character and identity, at least to internal reforms that echo some of those administrative law principles. This is a trend that, however fragmented and unsystematic, the GAL project praises and attempts to spread.

This systematisation is put forward by means of a package of accountability tools; more precisely, by the institutional corollaries of two fundamental rights: the “right to participation” and the “right to defense”.<sup>249</sup> Five are the dominant devices: transparency, participation, interest-representation, revisability and duty of justification.<sup>250</sup> This is a rather crude package.<sup>251</sup> An in-depth exploration of its five principles would highlight several variations through which each principle can be concretely carried out.

Transparency, for example, can mean either access to gross information, or an active effort to provide a more intelligible and qualitatively superior piece of information. Participation, in the same way, can be widened through mechanisms of consultation, notice and comment, hearings and so on.<sup>252</sup> Interest-representation can manifest itself through the ascription of actual weight to groups or individuals in

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regulatory decisions that affect a nation; and second, the development of new mechanisms of administrative law at the global level to address decisions and rules made within the intergovernmental regimes”. (2005, 16)

<sup>248</sup> Cassese provides a number of examples: “a body of general principles is being consolidated in the global arena: the principle of legality, the right to participate in the formation of norms (‘notice and comment’, as recognized by the OIE), the duty of consultation (imposed by the World Bank on domestic administrations in the context of the Heavily Indebted Poor Countries Initiative), the right to be heard (‘procedural participation’ recognized by the FATF and the WTO Appellate Body), the right to access administrative documents, the duty to give reasons for administrative acts (the duty to give a reasoned decision, affirmed by the WTO Appellate Body), the right to decisions based upon scientific and testable data, and the principle of proportionality.” (2006a, 690) Echoing the same realisation in another text, he claims that global administration is not “still ruled by secrecy, informality and arbitrariness”. (2006b, 2)

<sup>249</sup> As Cassese further explains, these rights engender a “chance to intervene” and a “right to appeal”. (2006a, 685)

<sup>250</sup> Kingsbury et al. argue that GAL include “mechanisms, principles, practices, and supporting social understanding that promote or otherwise affect the accountability of global administrative bodies, in particular by ensuring they meet adequate standards of transparency, participation, reasoned decision, and legality, and by providing effective review of the rules and decisions they make”. (2005, 17) See also Mashaw, 2005, 11 and MacDonald and Shamir-Borer, 2008, 11.

<sup>251</sup> The GAL package is quite similar to other proposals for accountability enhancement. Koppell, for example, proposes five “conceptions” or “dimensions” of accountability: transparency, liability, controllability, responsibility, and responsiveness (2005, 95) In his later book, he called these same five elements as “concepts” of accountability. (2010, 34) The “Global Accountability Framework 2011”, written by Hammer and Lewis under the auspices of One World Trust, establishes four core dimensions that make an organisation more accountable to its stakeholders: transparency, participation, evaluation, and complaint and response mechanisms.

<sup>252</sup> Cassese (2006b) furnishes a thorough classification of participatory channels.

decision-making. The right to review, in turn, can be implemented through a variety of appeal procedures. A duty of principled and public reason-giving, finally, may range from technical jargon conveyed through rigid structures of argumentation and to an accessible terminology and rhetoric.<sup>253</sup> From the perspective of the 11 descriptive coordinates of accountability discussed in the previous chapter, this package involves a range of permutations of those variables.

Instead of a one-fits-all programme of accountability enhancement, the role and weight of those principles need to be grasped and adjusted to the context of each global administrative body, in accordance with its respective purpose and power.<sup>254</sup> Domestic administrative law may be a rich source of inspiration, but does not deliver definitive answers. In this spirit, the GAL project intends to be “modular”<sup>255</sup> and sectorally sensitive, that is, to verify how, in each and every global body, those general principles of administrative law are and should be put into effect. The exact mix and form, or the particular version of due process that obtains in one sector,<sup>256</sup> “remains very much up for grabs”.<sup>257</sup> Therefore, a “fully emerged” GAL, as the project envisions it, does neither possess universal homogeneity in terms of

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<sup>253</sup> Some of the GAL proponents include ‘accountability’ as a discrete device alongside the others of this package. See, for example, Stewart (2008). What is often meant by accountability is a particular procedure for sanctioning the power-holder. We could name this sense of accountability as ‘accountability *stricto sensu*’. For reasons that have been clarified in chapter 1, however, reducing accountability to a proceduralised sanctioning device can lead to overlooking other accountability types and less formal sanctions that take place. I prefer, thus, keeping ‘accountability’ in its ‘*lato sensu*’ perspective, which covers all devices.

<sup>254</sup> This is what Krisch means by pointing to the “relative and provisional” features of the project: “GAL is a self-consciously ‘modest’ project” which comes up with “relative and provisional conclusions”. (2010, 262)

<sup>255</sup> MacDonald and Shamir-Borer explicate that feature: “Global administrative law thus has a *modular quality*: it provides a *toolkit* that allows us to pick and choose the mechanisms that best suit the particular regulatory structure in question.” (2008, 13) GAL’s modular quality would escape one of the traps pointed by Rosenau: “A third trap to avoid is that of aspiring to one instrument of accountability suitable to all situations.” (2001, 354) This quality would facilitate, moreover, what Nye has identified as “willingness to experiment”: “Increasing the perceived legitimacy of international governance is therefore an important objective and requires three things: greater clarity about democracy, a richer understanding of accountability, and a willingness to experiment.” (2001, 3)

<sup>256</sup> Cassese, 2006b, 57.

<sup>257</sup> MacDonald and Shamir-Borer, 2008, 53

procedural solutions, nor resembles an arbitrary “adhocracy”.<sup>258</sup> It leads, instead, to a relative convergence between those devices.<sup>259</sup>

### 5.3 *A contextual and pragmatic claim on feasibility*

The normative aspiration of the GAL project is to improve global centres of decision-making through institutional devices ‘writ small’. Instead of contending that international institutions should resemble the institutional archetypes of the grandiose political ideals instantiated at the state level, it proposes some low-profile administrative law devices. Instead of defending the transference of the full box of thick procedural mechanisms that those ideals carry, it takes a less bombastic and controversial step: it disaggregates those ideals and tries to gradually embed some of their constituent components into transnational institutions. According to its supporters, then, one of the most appealing characteristics of the GAL project is its greater feasibility as compared to other approaches to global governance.

The GAL project is reputedly more attentive to *realpolitik*, to the need of adjusting normative calls to what is politically viable and expedient. It elucidates the values underlying institutional alternatives that already are, so to say, ‘on the table’ of historical possibilities. It works “within a given institutional and social environment”.<sup>260</sup> With that in mind, we can say that the GAL project strives not only to “rebuild the ship at sea”<sup>261</sup> (to borrow a metaphor that suggestively conveys the burden of institutional design), but also to do so at a micro-level. It defends, as the most fitting approach to legal and political development, small-scale and opportune

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<sup>258</sup> This neologism was coined by Cassese: “From the organizational standpoint, the global legal order does not follow a single model. It is instead an example of ‘adhocracy,’ in the sense that it adapts to the functions to be performed, sector by sector.” (2006a, 679) In another text, Cassese also elaborates on sectoral conformations of global due process: “each regime has its own due process principle, not every one grants participatory rights and there is a lack of overarching principles, that can be applied to all regulatory regimes.” (2006b, 57) See also Chesterman, 2009, 77.

<sup>259</sup> As MacDonald and Shamir-Borer explain: “We suggest that we might expect to see this eventual unity manifest itself in three main ways: in a *relative homogeneity* of general, abstract principles that are then applied differently in different sectors; in a *relative homogeneity* in the more concrete rules and mechanisms applied within sectors both domestically and extranationally; and in the creation of a *generalised ‘culture’* of administrative law, in which it can be generally expected that some type of administrative law rules, some form of concretisation of the general principles, will attach to all exercises of public power in global governance.” (2008, 27)

<sup>260</sup> Krisch, 2010, 257. And Krisch complements: “It is a project with a partial, not a comprehensive aspiration and seeks an independent existence both as an analytical project and as a normative one, albeit on narrower (and potentially less contested) grounds.” (2010, 258)

<sup>261</sup> This metaphor is the title of a book co-organized by Elster, Offe and Preuss (1998).

improvements of existing regimes through taking into account all their constraints and path dependencies.<sup>262</sup> It introduces itself as the ‘next step’, not as the ‘ultimate step’. In other words, the GAL project endorses a cautious tactic for walking ‘one step at a time’ on the way from ‘here’ to ‘there’. It allows for some prescriptions, but is prudent enough not to ignore the non-ideal factual contexts.<sup>263</sup> To sum up, its philosophy adopts a measure of incremental pragmatism.<sup>264</sup>

It still is important to remark that, although political ideals can be deflated by down-to-earth estimations of historical feasibility, such deflations do not render the said ideals less central for unveiling the critical grip of any accountability claim.<sup>265</sup> That the GAL project has no intent to build ‘global democracy’, whatever that might mean in practice, has been stated a number of times.<sup>266</sup> Despite subscribing to “bracket questions of democracy”, the project does not abandon the purpose of “nurturing democratic attributes and tendencies where viable”.<sup>267</sup>

Neither this pragmatic hands-on approach, nor the call for accountability, participation and so on has been advocated only by the GAL project.<sup>268</sup> Nonetheless, the GAL proponents do not consider it only as a second-best strategy in the light of

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<sup>262</sup> Krisch, 2010, 255-258.

<sup>263</sup> Ferejohn addresses the question likewise: “My answer will be more or less optimistic: I think there are ways to improve things from a recognizably democratic perspective, even in the nonideal global context.” (2007, 2)

<sup>264</sup> The pragmatism of the GAL project, for MacDonald and Shamir-Borer, relies on “acknowledging and confronting the realities of globalization. It recognizes the structural nature of global governance ‘as is’, and works from within.” (2008, 13) It would help escaping one of Rosenau’s traps: “A second mistake to avoid is that of focusing on radical rather than practical changes.” (2001, 354)

<sup>265</sup> Such theoretical vigilance, that aligns the ambition of normative arguments with what is believed to be historically realistic, is a common recourse in the literature of global politics that GAL resonates with. This point has not escaped the attention of Stewart, Kingsbury, Krisch, MacDonald, in the publications already mentioned.

<sup>266</sup> For instance, as Kingsbury et al. have argued: “This inquiry usefully highlights the extent to which mechanisms of procedural participation and review, taken for granted in domestic administrative action, are lacking on the global level. At the same time it invites development of institutional procedures, principles, and remedies with objectives short of building a *full fledged (and at present illusory) global democracy*.” (2005, 27)

<sup>267</sup> Kingsbury et al., 2005, 50. And they continue: “Perhaps, then, it would be advisable for global administrative law to pursue a *less ambitious and more pragmatic approach*. It could, for example, recognize that under current circumstances, no satisfactory democratic basis for global administration is available but that global administrative structures are nevertheless required to deal with problems national democracies are unable to solve on their own”. (2005, 50)

<sup>268</sup> For example, Keohane and Grant argue that global accountability requires “new, pragmatic approaches”, which should be sensitive to two types of accountability: to states (delegation model) and to those affected by its decisions (participation model). If the latter were always to trump the former, the immediate risk for international institutions would be to lose state-members’ support (financial and any other). At the same time, if the interests of those who are affected by international bodies’ decisions were overlooked, international institutions’ legitimacy might be questioned. For them, the key to have vigorous global accountability lies somewhere in between the two models. (2005, 34)



the impracticability of extending complex and costly participatory mechanisms to much larger scales. According to its proponents, the GAL project would rather be a first-best alternative under the circumstances of radical pluralism and given the need for reasonable accommodation.<sup>269</sup> Instead of freezing arrangements that will likely mirror the current asymmetrical power relations in the transnational sphere, GAL mechanisms would achieve the feat of channeling a plurality of voices without foreclosing further contestation.<sup>270</sup>

## **6. The shifting places of legitimacy discourses: GAL project and its partners**

The reshuffle of transnational institutions, as earlier explained, calls for fresh elaboration of the categories that have long served law and politics within and among the states. Nobody knows how imminent arrangements will look like, but we do have enough historical evidence to believe that whatever materialises will further mitigate and constrain state sovereignty.<sup>271</sup> What is disturbing for some, and auspicious for others, is that the sovereignty-based conceptual apparatus and procedural devices are not automatically available for organising and legitimising this set of bodies and practices. In other words, that apparatus is not immediately applicable when we shift from the one context to the other.

This chapter has so far focused upon some particular contexts of accountability discourses. These discourses consist in a set of claims about how accountable an institution ought to be. They follow a basic logical structure, which connects a factual premise – ‘as long as one holds power’ – to a prescriptive inference – ‘one should be accountable for how such power is exercised’. If one presses that inference a bit further – by asking, for example, in whose name and for the sake of what value power should be accountable – one will get trapped in inexorable normative debates.

The concepts of accountability and legitimacy, not surprisingly, go hand in hand. They do not simply overlap though. Whereas all legitimate power is accountable power, not all accountable power is legitimate. The previous chapter

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<sup>269</sup> MacDonald, 2008, 18.

<sup>270</sup> According to Krisch: “In the divided, highly contested space of the postnational, ideal solutions are elusive – pluralism may be the best option we have.” (2009, 45) See also MacDonald, 2008, 21.

<sup>271</sup> Boyle, 1993, 95.

defended that claim through the distinction between normative and crude descriptive notions of accountability.<sup>272</sup> A timely clarification about the relationship between accountability and legitimacy helps to appreciate the character of the GAL project.

Legitimacy is a central normative category of legal and political thought.<sup>273</sup> It is the moral flip side of power.<sup>274</sup> Whether there are acceptable reasons to justify authority claims and whether an individual has a genuine duty to obey are the elementary questions it confronts. A conception of legitimacy devises counter-factual standards against which actual institutions and their decisions can be assessed. This assessment enables reflection, critique and institutional reform. Oftentimes, when the structure of power in question has reshaped itself in the course of history, the bell of legitimacy rang. This process of continuing stabilisation and destabilisation of legitimacy discourses is an essential feature and a constant burden of institutional development.

Although legitimacy is an indispensable quality to the operation of legal institutions, when it comes to the province of transnational law, its meaning and demands are still far from straightforward.<sup>275</sup> At the outset of such inquiry, one should be attentive to three methodological warnings: first, it is crucial to distinguish binary ‘either-or’ from gradualist ‘more-or-less’ styles of legitimacy talk; second, one cannot ignore that international law is not a monolithic box composed of homogenous norms and institutions, but a combination of elements of strikingly different legal nature; third, legitimacy standards usually combine elements of input and output. Let me shortly explain these claims and then check how GAL handles them.

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<sup>272</sup> Zürn clarifies the two sides of the concept of accountability: the normative, associated with validity and a claim to legitimacy, and the descriptive, attached to societal acceptance. (2004, 260)

<sup>273</sup> Pitkin states: “To call something a legitimate authority is normally to imply that it ought to be obeyed. You cannot, without further rather elaborate explanation, maintain simultaneously *both* that this government has legitimate authority over you *and* that you have no obligation to obey it”. (1966, 39)

<sup>274</sup> Inadvertent uses of different definitions of the word ‘legitimacy’ may cause misunderstandings. The presently used normative definition should not be mistaken with the descriptive senses in which the term is sometimes used: legitimacy as the fact of obedience (sociological version) and legitimacy as legality (formal validity, sheer compliance with rules, whatever the content of the rules is). Fallon (2005) has satisfactorily analysed this distinction. There are, for sure, intricate interconnections among the moral, the sociological and the legal conceptions. These connections must be drawn carefully so that one avoids making the moral collapse into either descriptive senses. The risk is instrumentalising the former for the sake of either one of the latter, defending the putative moral quality of a certain arrangement only to the extent that it generates compliance, or worse, taking the ‘fact of compliance’ as an indicator of moral quality.

<sup>275</sup> See Franck (1990 and 1995), Bodansky (1999), Kahn (2000), Weiler (2004), Kumm (2004), Esty (2005).

By defining legitimacy as a matter of degree rather than an all-or-nothing attribute, the analysis enters a ‘compared to what’ basis and sidesteps a static ‘black and white’ conceptual straitjacket. Of course, this nuanced analysis does not ignore that, no matter how gradualist an approach might be, it does still need to establish a general threshold between the legitimate and illegitimate terrains (within which there might be, respectively, degrees of legitimacy or illegitimacy). This concession keeps us safe from the risk of ending up accepting that all decisions of international institutions have at least some grain of legitimacy. In a way, thus, there is a binary element even in a gradualist approach, and the line between legitimacy and illegitimacy must be drawn somewhere. However that may be, the acknowledgement of varying degrees of legitimacy allows for more refined contrasts between institutions.

Secondly, being sensitive to the multiple types of transnational law also helps refining the analysis. It is not possible to think about legitimacy in transnational law without a diligent perception of the variety of norms and institutions with distinct abilities to make discretionary decisions, to affect the lives of other agents and to ‘bite’. Law beyond the state constitutes a complex geological body,<sup>276</sup> not a fixed container formed by indistinguishable components. Each one of these legal types entails different measures of authority and a particular relation between authority and state consent. Unpacking this “global legal configuration”,<sup>277</sup> then, illuminates what precise legitimacy demand will be adequate to each institution.

Finally, the ascription of legitimacy to a particular institution often hinges upon two sorts of concomitant standards: a formal source-based and a substantive result-based standard.<sup>278</sup> To use a more common jargon in the literature of international law, they correspond, respectively, to input and output patterns of legitimacy. Although one can claim that legitimacy tends primarily, even instinctively, to be associated with sources and procedures, so that disagreement upon outputs can be outweighed by a previous endorsement to a *modus operandi*, outcomes

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<sup>276</sup> To use, again, Weiler’s metaphor (2004, 552).

<sup>277</sup> Walker (2008a)

<sup>278</sup> Typical examples of the former are the *pouvoir constituant*, elections, principal-agent delegations and consent, all of them embodying an autonomous act of will, an opportunity of an agent to have a say or exercise some influence upon a decision. Examples of the latter will necessarily bear upon rights, measures of reasonableness, proportionality and so on.

can hardly be excluded from the overall legitimacy assessment. That *prima facie* deference to procedures, therefore, can hardly withstand a flagrantly wrong outcome.

The discourses on legitimate accountability at the transnational level are various. The quarrel between them can be linguistic, conceptual and structural. It is linguistic when the choice of terms that will carry the normative proposal engenders a ‘politics of label’. It becomes conceptual when the actual elucidation of those terms points to different directions and prompts a “politics of definition”.<sup>279</sup> It also might get structural when the concrete arrangements that try to put those concepts into effect finally lead up to a ‘politics of institutional design’.

Among the main partners of GAL, global democracy is one such candidate. Scholars discuss whether the word, the concept and the conventional machinery of democracy, being an “indispensable normative component for the legitimacy of a legal order”,<sup>280</sup> can be transposed into the transnational context. The absence of a *demos* at that level, for Weiler, makes that alternative innocuous.<sup>281</sup> Whereas a *demos* – the shared sense of community and belonging to a political system – would help to explain why an opposing domestic minority should be bound by the decision of the majority, at the global level, for Weiler, the deeper cultural differences would make the acceptability of majoritarian decision-making unrealistic.<sup>282</sup>

Cohen and Sabel, among others, go in the opposite direction. For them, the implausibility of replicating domestic democracy in the transnational setting does not render it pointless: “dismissing the possibility of global democracy, as often done, by saying ‘no demos, no democracy’ is no more helpful than responding to the chicken and egg problem by saying ‘no chicken, no egg’.”<sup>283</sup> It is not clear how far the GAL project is from a flexible approach of the kind put forward by Cohen and Sabel. In spite of opting for a distinct label and of being more hesitant to associate itself with

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<sup>279</sup> For an example of the “politics of definition”, see Walker, 2008b, 524.

<sup>280</sup> Weiler, 2004, 547.

<sup>281</sup> Weiler argues: “The *demos* is an ontological requirement of democracy. There is no *demos* underlying international governance, but it is not even easy to conceptualize what that *demos* would be like.” (2004, 560) For Bodansky, unless there is an identifiable group able to “make decisions” either by themselves or through representatives, there is hardly a democratic arrangement. The formal devices of direct participation or some sort of representativeness are, as opposed to Weiler’s cultural notion of *demos*, inherent to democracy. (1999, 614).

<sup>282</sup> Bodansky, 1999, 615-617.

<sup>283</sup> Cohen and Sabel, 2006, 767. For Búrca, despite the usual attachment of the concept of democracy to the context of the state, one should not necessarily be satisfied with global governance without democracy. She argues: “any serious proposal for addressing the legitimacy of transnational governance must include a robust *democratic aspiration*.” (2007, 237)

democracy, what GAL project advances in terms of procedural mechanisms often resonate with democratic qualities.

Global constitutionalism, in turn, as defined by GAL advocates, has a strikingly more wide-ranging scope. Its aim would be to develop a “fully justified global order”,<sup>284</sup> and it basically pursues it by reproducing much of what is cherished in the domestic domain: human rights coupled with judicial review and strong legalisation of political relations, all under the auspices of a constitutional text.<sup>285</sup> It would put the emphasis on the foundational moment (of a *pouvoir constituant* type), through which an all-encompassing polity makes a claim of agency. GCon, in sum, intends to keep the “C-word”<sup>286</sup> when it moves beyond the state. It requires a vast institutional reconstruction and, therefore, for that operation to take hold, one cannot but presuppose a significant level of societal consensus in the global order.

Despite sharing a departing goal – “correcting the legitimacy deficit that global regulatory governance suffers”<sup>287</sup> or “subjecting public power to public control”<sup>288</sup> – GCon and GAL convey different roadmaps for political action and reform. They have different prudential judgments on feasibility and timing,<sup>289</sup> furnish different scales of legitimate accountability.

The GAL project ascribes to GAL a myriad of advantageous features. If one gathers together the main adjectives used by GAL’s literature, a minimal list would include: open, plural, flexible and adaptable; versatile, pragmatic and modular; heterarchical, horizontal, soft; relative and provisional; realistic, feasible and modest; incremental, quotidian<sup>290</sup> and bottom-up. These qualities should be contrasted with the ones attributed to GCon: unity, hierarchy, idealism, verticality, command-and-control, top-down.

Perhaps this contrast overstates their differences and underrates their similarities. In any event, arguments for the superiority of GAL are conditional and

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<sup>284</sup> Krisch, 2010, 253.

<sup>285</sup> Krisch, 2010, 253-254.

<sup>286</sup> To borrow Stein’s expression (2005).

<sup>287</sup> MacDonald and Shamir-Borer, 2008, 3. Krisch points out that, while both GCon and GAL are concerned with the legitimacy deficit of global governance, they do so from different angles. The peculiarity of the latter, as noted earlier, would be that it “focuses on questions of accountability”. (2010, 246 and 256) However, in light of what has been argued in chapter 1, this is a narrow concept of accountability, which nonetheless permeates part of the literature on the GAL project.

<sup>288</sup> MacDonald, 2008, 18.

<sup>289</sup> This ‘temporal self-restraint’ refers, as it has been constantly reminded by MacDonald and Shamir-Borer, to the conditions that exist “now and for the foreseeable future”. (2008, 5)

<sup>290</sup> MacDonald and Shamir-Borer, 2008, 51.

context-oriented. GAL would be ethically,<sup>291</sup> functionally<sup>292</sup> and practically superior<sup>293</sup> to the alternative candidates, but only under the specific historical context it departs from. It seems to be better shaped, moreover, to meet the requirements of the three methodological warnings submitted above: (i) by disaggregating the several devices ‘writ small’ and being open to the variety of combinations between them, it is more sensible to variable degrees of legitimacy; (ii) through its comprehensive taxonomy, it directs its normative grip to legal layers that GCon ignores;<sup>294</sup> (iii) finally, unlike what Cassese’s emphasis on “global due process” might suggest, GAL does not only impact on input legitimacy, but also includes output considerations.<sup>295</sup>

The GAL project vindicates regular yet minute refinement rather than root-and-branch reinvention of global governance structures. To put it differently, it favours retail reform rather than wholesale revolution. Krisch contends that the project seeks the realisation of “narrower political ideals, especially accountability”.<sup>296</sup> For him, concentrating on accountability would release GAL from the controversial normative connotations of ‘legitimacy’. That, however, is an equivocal statement, since accountability and legitimacy, as I have argued earlier, are inextricably tied up in one another. The difference between GAL and other discourses lies in the character of the latter’s proposals on legitimate accountability, not on the

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<sup>291</sup> MacDonald, 2008, 21.

<sup>292</sup> For MacDonald, GAL is “divested of a constitutional impulse to hierarchy and unity” and “well calibrated to respond to irreducibly plural and heterarchical conditions of contemporary global governance”. (2008, 24-25) As MacDonald and Shamir-Borer also claim: “In providing us with both a framework and tools for apprehending these institutions largely as they are (or in any event, to change them in a less invasive manner than constitutionalist approaches of necessity must), global administrative law is better adapted to protect the regulatory gains that have come from *institutional and functional specification*”. (2008, 37)

<sup>293</sup> For Chesterman, GAL would be practically superior because it is “more likely to find traction with decision-makers themselves.” (2009, 77)

<sup>294</sup> For MacDonald, GCon cannot account for the vast array of different bodies that exercise public power in global governance. (2008, 18) This partly leads up to MacDonald’s succinct conclusion: “Global administrative law is a necessary complement to any global constitutionalism; the inverse, however, does not hold.” (2008, 24-25)

<sup>295</sup> MacDonald and Shamir-Borer highlight the procedural side: “It is worth emphasizing that global administrative law – for the most part at least – focuses largely on formal and procedural, rather than substantive, requirements. These are intended not to definitively condition any substantive regulatory outcome, but rather to ensure, to the greatest degree possible, that all affected by public power have a say.” (2008, 53) Cassese goes in the same direction and coins the expressions “global due process” or “global proceduralism” to characterise the point of GAL. (2006b, 55) Chesterman, however, expands the agenda of GAL to accommodate the substantive/epistemic considerations: “The goals of global administrative law go beyond constraining decision-makers, however. In addition to providing ‘input legitimacy’ to decision-making processes, broadening participation, shining light on deliberations and providing the possibility of revisiting bad or unfair choices, global administrative law should *improve the decisions themselves*. This may be thought of as ‘output legitimacy’.” (2009, 88)

<sup>296</sup> Krisch, 2010, 246.

putative capacity of the former to bracket or shield itself from intricate normative debates. Accountability, in itself, stands for nothing and can hardly be understood as a political ideal per se. The distinctiveness of GAL is more plausibly associated with what its launching paper has suggested: to allow rethinking the usual legitimacy concerns in a more “specific and focused way”.<sup>297</sup>

This interpretive effort situates the GAL project within a larger picture, and sheds light on the reasons that might answer persistent questions – about which normative spectre should undergird global governance for the time being; and about whether administrative law, in light of pragmatic considerations, should go first – in favour of GAL. In the forthcoming case-studies within the climate change sector, I will test the limits of GAL’s contribution to that overall endeavour.

## **7. Prologue to the next chapters**

Before proceeding to the next stage of the thesis, which undertakes an exercise of concrete institutional analysis, some recapitulation might be helpful. That is, it seems opportune to notice how chapter 1 harmonises with chapter 2 and how, if taken together, the two chapters give north to the forthcoming inquiry. I would like to take stock, thus, of the research questions announced in the general introduction of the thesis and check which of them has been answered so far, however shortly and tentatively, and what has yet to be addressed.

The current chapter engaged in a threefold mapping review: (i) it portrayed, according to the basic divide between the angles ‘within the state’ and ‘beyond the state’, the geographical and functional contexts in which real-world political accountability mechanisms exist and interact; (ii) it interpreted one already influential legitimating discourse that is being used as a benchmark to appraise institutions and political processes beyond the state – GAL; lastly, (iii) it highlighted how this sort of accountability discourses is tied with demands for legitimacy in global governance. In other words, this chapter introduced us to the changeable institutional setting that chapter 1 lacked. It underscored the fact that one can grasp the actual operation and concrete roles of accountability only when immersed in a given context, however formalised or institutionalised that context might be.

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<sup>297</sup> Kingsbury et al., 2005, 27.

The articulation of *concepts* and *contexts* of accountability, to sum up, is the bond that fastens chapters 1 and 2 together. They provided us with a hopefully enlightening template for analysis. Undoubtedly, both chapters are abridged versions of what could constitute an entire research project in itself. Their scope was large, indeed. The purpose, however, was *stipulative* and *demarcatory*, so that the following stages of the thesis are grounded on a well-informed conceptual framework. In the context of the current work, the two first chapters are instrumental in examining the three particular institutions (IPCC, CCKP, CDM). Without this opening conceptual delineation, the exercise that follows would lack a stable anchor.

Chapters 4, 5 and 6 will restate, in a further contextualised way, the questions that chapters 1 and 2 approached at a still abstract level. These chapters will ask and try to answer both a descriptive question and a circumscribed normative question, namely: (i) How accountable is that institution? (ii) How appropriate is that specific accountability arrangement?

Standing in between these two main stages of the thesis, chapter 3 will locate the main features and recent developments of the Climate Change Regime. It helps the transition to chapters 4, 5 and 6 get smoother. Checking whether those three international institutions fare well with regards to the critical rationales of accountability is an inherently controversial undertaking. To answer such question, one needs not only to be fully knowledgeable of how these institutions were designed and do actually work, but also to have a framework that structures such judgment and justifies the standards for preferring certain legal and institutional states of affairs over others. Normative criteria, whatever direction they point to, allow the observer to take such a stand. Without such criteria, one can hardly judge in a frank and open way.

The literature on international law that was covered along this chapter has important facets. This familiar backdrop can be organised at three levels. First, when this literature inquires about what is happening, from the legal and political points of view, in the domain of international relations, it tends to take for granted a set of *factual commonplaces*: (i) that the most important political tests faced by states nowadays have a global scale, which is, intriguingly enough, both a cause and a consequence of the level of inter-connectedness and interdependence between states; (ii) that classical institutional arrangements of international law are, thus, insufficient to handle those qualitatively knottier problems; (iii) that a multiplicity of relevant



non-state actors has appeared in this arena, and begin to play indispensable roles. Whereas the two former factual commonplaces are hardly disputed among the authors, the accuracy and credibility of the latter still generates widespread disagreement.

Secondly, when this literature proceeds to inquire about why those facts are problematic, it generally resorts to some slightly disputed *normative commonplaces*: (i) that there is a need for deeper structures of global coordination and cooperation, so that those taxing collective tasks are efficiently pursued; (ii) that, at the same time, there is a legitimacy deficit of current arrangements, a critical diagnosis that, not rarely, is couched through the language of accountability.

Thirdly, when this literature finally asks what should be done, both in the short and in the long run, it faces an overwhelming *legal and political conundrum*, which confirms that the calls for novel arrangements are widely disputed and variegated. Assuming that a renovated model of transnational law is necessary to tackle, for example, problems as costly and complex as climate change,<sup>298</sup> it is widely accepted that states' consent does not go far enough in neither facilitating coordination nor in legitimising transnational decision-making of that thicker kind.<sup>299</sup> There is, however, little agreement about what this reformist endeavour should practically mean apart from the necessary mitigation of sovereignty.<sup>300</sup>

How to build effective institutions and decision-making processes that do not suffer from the existing legitimacy or accountability deficits? Or, at least, how to start implementing further mechanisms that, pragmatically and incrementally, help improve the current state of affairs? For GCon and GAL alike, what is out there in the international and transnational institutional arena is troubling for various reasons. Both, as we have seen, point to alternative paths and are grounded on different 'tests of appropriateness', as I will maintain below.

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<sup>298</sup> See the Hague Declaration on Environment, March 1989, I.L.M 28 (1989) 1308, according to which 24 countries called for "new institutional authority (...) which (...) shall involve such decision-making procedures as may be effective even if, on occasion, unanimous agreement has not been achieved." See also Bodansky, 1999, 598-599.

<sup>299</sup> This is the thesis of Bodansky, 1999, 606-609.

<sup>300</sup> In this sense, see Bodansky, 1999, 596-624; Kahn, 2000, 1-18; Weiler, 2004, 547-562. About the necessary mitigation of sovereignty see: Chayes and Chayes, 1995, 25-26; Slaughter, 2004, 286-287; Franck (1995).

### ***7.1 Test of appropriateness: which accountability for what institutional purpose?***

A test of appropriateness can be boiled down to a core general question: in what way is it sensible to call one particular institution to account? Or how should an institution, having its singularities in mind, be held accountable? Needless to say, there is no single and wholesale recipe or, to use a fashionable expression, no ‘one-size-fits-all’ solution for warranted accountability arrangements. This is contingent upon an array of factors. Political institutions vary immensely in their purposes, mandates, power resources and decisional contexts.<sup>301</sup> However, whereas domestic institutions have been operating in a relatively stabilised normative framework that defines what expectations they are supposed to attain and which accountability devices would better serve those expectations, the appropriate accountability of international institutions remains very much an open question, from both a normative and practical viewpoint. That is, the question about the general normative principles in the name of which practical accountability tools will be implemented is a highly contested issue.

Philp offers a comprehensive yet compact formulation about what a test of appropriateness should entail. Accountability relationships, for him, “need to be clear about office holders’ *formal obligations*, about the extent to which office holders have *discretion* within those parameters and about the *type of judgement* they are exercising when they use their discretion – whether managerial, professional or political in character.” More straightforwardly, Philp adds that “the form that accountability takes *needs to be appropriate* to the *scale and scope* of that discretion, to the *standing and qualities* that are necessary to exercise that discretion and to the *time frame* required for decisions to take effect”.<sup>302</sup>

There is a mixture of multiple components in this rich statement. By pointing out that appropriate accountability arrangements should be correlated to the type of judgment the power-holder is ordinarily supposed to make and to the scale and scope of the discretion she has, Philp’s account captures an indispensable set of information that has to be factored into any intelligent design. An observer, when producing a

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<sup>301</sup> Alvarez asserts: “And it is not just that IOs differ among themselves with respect to type of members, purposes, mandate and delegated powers. IOs differ with respect to how states have defined their own relationship with their institutional creations.” (2006, 27)

<sup>302</sup> Philp, 2009, 44 (the *italics* of the quotation are mine).

critical assessment of the accountability arrangement that takes place before her, needs to minimally pinpoint each of these elements, without which she would fail to say or offer anything constructive.

The aforementioned passage registers the primary building blocks of appropriate accountability. It still does not stipulate, though, which exact amalgam of procedural devices will derive from each different configuration of those variables. It underscores, in sum, what should be the *constitutive determinants* of accountability, but does not specify what *derivative arrangement* will follow from each possible combination of those determinants.

As already seen, GAL project offers one possible assortment of accountability devices (the *derivative arrangement*) to fill up the space that is left open by Philp's generic statement of institutional design. His formal statement points to the pivotal determinants that will help tailoring devices like those furnished by the GAL project (transparency, participation, interest-representation, review and duty of justification). This missing link has not yet been thematised here and has to be further fleshed out. To put it differently, the precise shape that those GAL devices should have varies according to the particular features of the institution under inspection.

The 'context-oriented institutional designer', therefore, needs to be aware of the *test of appropriateness* that accountability should pass. Such a test, indeed, can be firstly constructed from an *external* point of view, that is, as an inquiry about whether the institution itself, and its respective purpose, are adequate and legitimate. Nevertheless, as long as this overall purpose is justified and accepted (or, perhaps, taken for granted), the designer needs to grasp, this time from an *internal* point of view, which means will most likely and proficiently match those given ends. To sum up, the designer asks which accountability devices will duly equip the body to do what it is meant to do in the first place.

This distinction, for sure, might be challenged by something along the lines of an insight aired by Mashaw: "at base, much of the dispute about accountability is a dispute about what particular institutions are meant to do, not how accountable they are in the doing of it."<sup>303</sup> What Mashaw notes, here, is that the *external* and *internal* perspectives, discriminated above, may well coalesce part of the time. In other words, in certain cases, one would not be able to define what role an institution will play

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<sup>303</sup> Mashaw, 2006, 117.

without thinking, simultaneously, on how accountable such an institution will be. The former question, then, would not have precedence over the latter. When ‘being accountable’ is part of the very institutional identity and purpose, both perspectives would turn out to be inherently intertwined and co-original.

This remark is relevant to our analysis because it bears upon whether, and to what extent, a test of appropriateness can be a test of ‘pure instrumentality’,<sup>304</sup> a scrutiny on the connection between means and pre-given ends. Accountability, for sure, cannot be fetishised as an end in itself, but its connection with the so-called institutional purpose can be more intricate than it appears at first glance.

This caveat tries to avoid the potential misunderstanding that may spring from the absolute insulation of institutional ends with regards to the means assembled for their pursuit. The question comes up because accountability devices may also be ascribed, as argued by the previous chapter, epistemic and populist functions, the points at which accountability and the institutional purpose inevitably connect. When turning more accountable enhances the capacity of an institution to perform its assigned purpose (rather than simply making it more controllable or accessible), such separation between ends and means (or institutional purpose and accountability devices), although still analytically relevant, would be artificial in practice.<sup>305</sup>

There is, therefore, a dialectical relation between the institutional purpose and the accountability package. It is not possible to entirely bracket the former and set it as an unshakable point of departure from which we discuss what the appropriate accountability devices should be. To be sure, one cannot be simply conflated with the other, but they are, at least sometimes, not free-standing entities either.

The following example helps to clarify the issue. If one ascribes an agency the role of regulating the environmental impact of industrial activity, one can hardly think about the performance of its role and the effectiveness of its decisions without touching upon the question of how accountable that agency will be (in particular, again, as regards the epistemic and populist functions). As long as one is concerned with how satisfactory and effective that performance is likely to be, it is advisable to ponder over how accountability devices may reinforce the purpose itself. In other

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<sup>304</sup> MacDonald, 2008, 24.

<sup>305</sup> Unlike the constitutional and democratic functions of accountability, which might be pragmatically helpful to the pursuit of a given institutional end but remain generally independent from it, the epistemic and populist functions of accountability are directly driven to the decisional tasks the institution is in charge of.

words, one cannot ignore how those devices might also improve the capacity of the institution to take better decisions and be respected.

A test of appropriateness involves an examination of how the plural functions of accountability are balanced and accommodated into an overall institutional structure. By slightly rephrasing Philp's statement, the test requires a consistent answer as to (i) how a set of procedures logically correspond to the institutional purpose, (ii) the amount of power ascribed to the institution in question to pursue such purpose, and (iii) the respective accountability configuration that controls and enhances the performance of that purpose.

The GAL project needs to advance its own test of appropriateness. The test cannot consist in just ticking the boxes of that procedural package *tout court*. Box-ticking, on its own, will not shed light on anything significant. The concrete application of GAL's framework will rather have to deliver an elaborate understanding of how those general principles should be actualised in each particular setting, in the light of each peculiar institutional purpose. In other words, the applicability of GAL's framework is a matter not only of crudely attesting the presence or absence, for example, of transparency tools, but also of opting for a certain kind of transparency which is, in turn, appropriately connected to the respective institutional purpose. And so on and so forth with each further GAL's principle.

As it happens with interpretive exercises in general, and legal interpretation in particular, testing the appropriateness of a procedural arrangement does not resemble the machine-like application of an algorithm. This does not mean that a framework is not a necessary resource to gauge how the overall arrangement fares from the perspective of each normative vision on global governance. The GAL project counts as one such vision. This type of framework helps us check how each procedural device turns accountability stronger or weaker, consequential or pointless; what normative vision accountability meets, approximates or chases; or what can be done to refine it within the boundaries of the respective normative view.

Just demanding the replication of GAL's procedural package, in its brute form, over whatever type of transnational body, would be a misguided exercise. It would fail to comprehend the relevant determinants for shaping the set of components of that package. That package tells only half of the story. It lacks a preceding functional trigger that indicates how those general principles should be tailored.

## **7.2 *The framework***

Echoing what numerous authors have contended, I claimed that to ask whether an authority is accountable is an uninteresting and misleading question. The critical query is whether there is appropriate accountability – whether there is too much, too little or just enough; whether the account-holders are the right ones; whether accountability is serving or impairing the pursuit of a justifiable institutional purpose; whether there is room for improvement; whether, ultimately, there is legitimate accountability.

Institutions of global governance, however questionable their legal shape and power structures might be, are being accountable some way or another. This verdict is neither novel nor remarkable. It rather assumes a broader concept of accountability, as the one here adopted.<sup>306</sup> Apart from scrutinising what types of accountability exists out there, then, one needs to further inquire into which type of accountability is desirable and how it can be strengthened. That is, apart from a descriptive portrait, one can also engage with the normative principles and equivalent procedural devices that turn an accountability relationship into a normatively attractive one. A normative step follows once the descriptive task has been completed. And that step cannot be taken in isolation from the overall institutional purpose.

Chapters 1 and 2 supplied a large number of conceptual elements in aid of the concrete institutional analysis to be developed in the next chapters. Putting them together in a way that is serviceable both to the structural description and to the normative assessment is the challenge of the remaining parts of this thesis. On the one hand, we have a set of descriptive coordinates that can be blended, in each context, to perform the four key legitimate functions of accountability. On the other, as I outlined it, GAL project advances five basic procedural devices, which consist in nothing more than particular dispositions of those coordinates.

GAL project intends to act as useful, if far from exhaustive, normative baseline for dealing with the current anxieties of institutional change in the domain of global governance. It does not confront, from an external point of view, the overall structure or purpose of an institution, but, from an internal point of view, defends the

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<sup>306</sup> See Keohane and Grant (2005), Philp (2009) and Krisch (2006 and 2010).

value of implementing those specific devices. I maintain that these devices would promote, or at least facilitate to some extent, the four-pronged functional task of accountability, as defined by the previous chapter: power-controlling, accessibility-fostering, capacity-seeking and legitimacy-triggering.

The pursuance of each of these four functions can be enhanced, obstructed or undermined by particular configurations of GAL's package. Each function will be more or less evidently salient in each device. Since not all functions can be maximised, and cannot but be differently adaptable to each institutional purpose, the general arrangement will require inevitable trade-offs and cost-benefit calculus. The devices will have to be moulded, then, according to sectoral demands.

To sum up, the test of appropriateness, as here stipulated, consists in contrasting a singular institutional *purpose* with a corresponding institutional *design* and, then, in checking what the accountability *functions* are and how they are pursued. The GAL's package offers one possible prism of institutional design to be explored.<sup>307</sup> This is the vantage point the chapters 4, 5 and 6 will approach in detail. First, chapter 3 will bring the overall Climate Change Regime to the fore and provide a bird's eye view of its formative historical process.

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<sup>307</sup> Chesterman elaborates upon the point and adaptability of GAL project in a similar vein: "The term 'global administrative law' does not presume that the normative response to these questions is uniform – or that it should be. But as an emerging area of practice, the concept of a global administrative law can help frame these questions of accountability and sketch some appropriate responses." (2009, 77)

### Chapter 3

#### The international law of climate change: a particular context

*“While the crew is arguing,  
the ship is getting closer to the rocks.”*<sup>308</sup>

#### 1. Introduction

Climate has never been stationary or entirely predictable and consistent. Climate *variability*, that is, the natural and non-anthropogenic oscillation of climate, is a well-known phenomenon, already documented and described by historians and scientists. Climate *change* is a chapter of another story. This term was coined to single out the precise impact that human interference, along the industrial era, has made on climate.<sup>309</sup> Its effect is believed to be deeper and, to some extent, irreversible. Its scale is reputedly global, but affects human life more heavily in some regions rather than others. Affected regions, moreover, are not necessarily those which have most contributed, by way of industry-led economic production, to the overall phenomenon.<sup>310</sup> Predictably, climate change amounts to a complicated legal and political puzzle. Solving, or at least managing this puzzle is one of the most acute questions of contemporary international law.

It took some time for international law to drive serious attention to these alarming facts. For the last three decades, though, politicians and law-makers have been far from indifferent to the increasing volume of evidences that science has

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<sup>308</sup> Dessler and Parson, 2006, 177.

<sup>309</sup> This understanding is embraced by article 1 of the Framework Convention on Climate Change. According to the FCCC, climate change means “a change of climate which is attributed directly or indirectly to human activity that alters the composition of the global atmosphere and which is in addition to natural climate variability observed over comparable time periods.” The IPCC has a different position, though. To the IPCC, climate variability occurs due to natural and anthropogenic causes. The glossary that was produced by the IPCC’s working group I, for the Fourth Assessment Report, states: “Climate variability refers to variations in the mean state and other statistics (such as standard deviations, the occurrence of extremes, etc.) of the climate on all spatial and temporal scales beyond that of individual weather events. Variability may be due to natural internal processes within the climate system (internal variability), or to variations in natural or anthropogenic external forcing (external variability)”. Available at: <http://www.ipcc.ch/pdf/glossary/ar4-wg1.pdf>

<sup>310</sup> Jim Yong Kim, of the World Bank, warns: “While every region of the world will be affected, the poor and most vulnerable would be hit hardest.” (Foreword, p. x, World Bank Report, “Turn Down the Heat: Why a 4°C Warmer World Must Be Avoided”, November 2012.)



produced thereupon. The actual intergovernmental negotiations about climate change have timidly started in the 90s and have increasingly occupied the international agenda ever since.<sup>311</sup> After a series of allegedly unsuccessful attempts to construct a legally concerted international response to the problem, the relevant academic literature has recently become more fatalistic on the prospects of a strong and capable enough international regime. Bodansky, for example, maintains that instead of leading towards substantive decisions, the current negotiations are trapped into a “meta-negotiation about what to negotiate”.<sup>312</sup> A “case for pessimism”, that is how others reckon the situation.<sup>313</sup> The general mood of the climate community, in the early 2010’s, is a gloomy one.

This atmosphere, however, has a history, and the general mood has not always been that defeatist. The Climate Change Regime, which is the compendium of multilateral agreements specifically addressing this problem under the auspices of the United Nations, formally begins with the adoption of the Framework Convention on Climate Change (FCCC), in 1992.<sup>314</sup> The FCCC does not impose substantive obligations on states to reduce emissions, but it establishes a set of principles and institutions that can lead the ongoing negotiations.

The subsequent 1997 Kyoto Protocol seemed a more promising episode of the climate change legal-political narrative. It set binding targets and a timetable for developed countries to reduce greenhouse gas emissions. On that opportunity, developed countries actually engaged in laborious negotiations and ended up not only with noteworthy targets, but also with market-based mechanisms tuned to achieve these targets in a cost-efficient manner, and a forthright compliance procedure. Developing countries, on the other hand, escaped any obligation related to the reduction of their own emissions.

The optimistic expectations generated by these innovations, nonetheless, were not exactly met by the beginning of the 2010’s. The legal-institutional approach launched by the FCCC and scaled up by the Kyoto Protocol is currently under a

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<sup>311</sup> Skodvin and Andresen, 2011, 166-167.

<sup>312</sup> Bodansky, 2012, 12.

<sup>313</sup> The title of the article by Røgeberg et al. (2010).

<sup>314</sup> There are other types of cooperation, which are focused on certain countries or issues. They emerged outside the United Nations process: such as the Major Economies Forum on Energy and Climate Change, the G8, and the G20. These additional forums of dialogue and exchange on climate change have led Keohane and Victor to call the Climate Change Regime a “regime complex” - a loose set of complementary and non-hierarchical institutions instead of a comprehensive regime. (2010, 4)

process of reappraisal. Allegedly crucial aspects of the Regime have sparked opposing reactions. Disagreements range from the controversy about the very applicability of some of the foundational principles to the questions of who and how should implement the reduction of emissions.

The current stalemate demonstrates how particularly difficult convergence is: it involves a partial displacement of states' own authority regarding environmental regulation to international bodies; it has a bearing on the rhythm of economic development of each state because, whatever the final international agreement on the issue may be, if any such final agreement can be reached and implemented, it will have to reshape the structure and logic of production in favour of a deeply contentious international goal.<sup>315</sup>

This chapter intends to draw an introductory yet comprehensive picture of what the Climate Change Regime entails. It is divided in five additional sections. The second section conceptualises the idea of a global common good and discusses how this concept applies to the climate, and how it affects the design of a regime that is supposed to tackle the issue. The third section describes the development of the Climate Change Regime, from its inception until the latest rounds of negotiations, and outlines its current structure. The fourth section delineates the reasons why I chose to examine, through the lenses of accountability and the GAL project, three specific actors of the Regime: the Intergovernmental Panel on Climate Change (IPCC), the Compliance Committee of the Kyoto Protocol (CCKP), and the Clean Development Mechanism (CDM). In spite of the continuing transformations of the overall structure of the Regime, these three actors synthesize three indispensable functions of the overwhelming task of organising a transnational collective reaction against global warming. Finally, the fifth section describes the common expository structure of the three chapters that follow.

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<sup>315</sup> Bondansky contends: "Climate change implicates virtually every area of domestic policy, including industrial, agricultural, energy, transportation, and land-use policy. As a result, the Climate Change Regime raises much greater domestic sensitivities than other international regimes, which have a more limited scope." (2012, 9)

## 2. Climate as a global common good: climate *change* as a global common threat

In the midst of global anxiety after the proliferation of swine flu, Prime Minister Gordon Brown voiced a call for global instant mobilisation: “Swine flu is an international problem now. It is across two continents. It has got to be dealt with by international organisations”.<sup>316</sup> At that moment, the international authority in charge of public health was already in action: the Emergency Committee of the World Health Organization declared that the situation constituted a “public health emergency of international concern” and pleaded for all countries to “intensify surveillance”.<sup>317</sup> In the following days, as the flu was burgeoning in other locations, the WHO issued new recommendations, again addressed mainly to the states.

One can easily read between the lines: the success of such mobilisation depends, to a large degree, on whether and to what extent countries are willing to cooperate. The swine flu episode is just one more example of how, in the contemporary world, local occurrences can reach a transnational scale with groundbreaking speed. They demand a prompt and concerted reaction of the political protagonists in the global scene – the nation-states. This protagonism, nevertheless, is far from having the same weight as it had in the heydays of the Westphalian international order, when it was traditionally ideated as a community of formally equal and sovereign states. The swine-flu story, like so many other stories that earn global interest, has an underlying moral logic: the promotion of global common goods is inimical to, or sits uneasily with, an outright sovereignty-based and fragmented international order.<sup>318</sup>

One should be careful, for sure, with a too quick analogy between public health and climate problems. Public health crises tend to have clearer causal chains. Furthermore, the diagnosis and the assessment of success or failure of most collective measures, at the national or transnational levels, oftentimes unfold more quickly. Climate, in turn, does not have so visible and short-terms causalities. The very notion of crisis, if crisis is conceived as the outbreak of a systemic instability that can be controlled through timely measures, does not neatly apply to climate problems, or at

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<sup>316</sup> Carrell and Williams (2009).

<sup>317</sup> Carrell and Williams (2009).

<sup>318</sup> For Krisch, conceiving global politics only in terms of classical international law would “lead to severe costs in the provision of global public goods”. (2010, 251)

least not at the same time-scale: a climate crisis is a long-term, inter-generational crisis. These features render the issue even more divisive and contested.

In his widely quoted “The Tragedy of Commons”, Garret Hardin foresees, back in 1968, the hurdles that international cooperation faces when it comes to regulating the global commons – the resources that pertain to everyone and, consequently, are free for each one’s enjoyment, such as the air we breathe. Hardin offers a pedestrian allegory. He imagines a pasture, which is open to anyone to raise cattle, as a common. The tragedy occurs when each cattleman realises that it is more profitable to add as many animals as possible to the pasture irrespective of the collective loss he might thus incur over time.

The reason underlying such behaviour is not difficult to detect: while the profits with the sale of the cattle will be enjoyed by the cattleman alone, the negative consequences of “overgrazing” the common will be shared by all other cattlemen. That metaphorical story provided a strong image for the discussion about the role of private property in incentivising rational economic behaviour, and about the role of political authority and law in coordinating collective action. Hardin’s explanation hints at the insurmountable difficulty of coordination in a world of sovereign states: “Each man is locked into a system that compels him to increase his herd without limit – in a world that is limited. Ruin is the destination toward which all men rush, each pursuing his own best interest in a society that believes in the freedom of the commons. Freedom in a commons brings ruin to all.”<sup>319</sup>

Climate faces a logically similar collective bind. “Overgrazing the pasture” at such global scale, however, leads to a collective loss of another sort.

A global common good can be a purely normative category or be combined with a perception of the inevitable factual need of a concerted collective action in global scale.<sup>320</sup> It is either derived from the sheer moral conviction that some material

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<sup>319</sup> Hardin, 1968, 1244.

<sup>320</sup> There is extensive literature on “global commons”. Wijkman, for example, argues that the absence of exclusive economic rights and a defined management strategy has led to an economic inefficiency of the global commons (1982, 511). The core concept of the term is uniform: “A commons is a resource to which no single decision-making unit holds exclusive title.” (Wijkman, 1982, 512) In this sense, see also Brauniger and König (2000), Falkner (1997), Myers and Myers (1982), Olson (1982). Walker employs a similar idea when referring to a “global public good” (2008b, 535). Weiler, finally, develops an equivalent approach of global commons through employing the concept of “common assets” as follows: “The common assets could be material such as the deep bed of high sea, or territorial such as certain areas of space. They can be functional such as certain aspects of collective security and they can even be spiritual: Internationally defined Human Rights or ecological norms represent common

resources or purely political issues are of such importance that they must be protected globally, or from the empirical datum that some resources cannot be rationally deployed but by a coherent collective approach.<sup>321</sup> Human rights are a handy example of the former. As for the latter, a further distinction could be drawn. First, there are those subject-areas that cannot be contained by geographical borders, like environmental and public health problems. Second, there are other subject-areas that, in theory, could be dealt with by states alone, but certainly not in a world with the level of interconnectedness our world has (like trade, finance, security etc.).<sup>322-323</sup>

Climate change is, then, nothing but one of many global threats that can only be reasonably addressed collectively: any response provided by the states alone, or by a group of states acting in an uncoordinated manner will be, at best, limited.<sup>324</sup> The global effects of environmental degradation will not be significantly sorted out if state A announces it is reducing its level of greenhouse gases emissions (the “trappers” of heat and, consequently, the main cause of climate change) and state B, which undergoes an economic boom, doubles its emissions. Artificial political borders do not help in controlling the level of greenhouse gases concentration in the atmosphere.<sup>325</sup>

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spiritual assets where States can no more assert their exclusive sovereignty, even within their territory, then they could over areas of space which extend above their air-space”. (2004, 556).

<sup>321</sup> This notion corresponds to what Weiler calls “common assets” – everything over which states cannot claim sovereignty, like the deep bed of high sea, collective security, human rights or environment. (2004, 556)

<sup>322</sup> Slaughter maintains: “Global governance, from this perspective, is not a matter of regulating states the way states regulate their citizens, but rather of addressing the issues and resolving the problems that result from citizens going global”. (2004a, 16)

<sup>323</sup> One could say, of course, that the distinction is fragile because the level of interconnectedness (that characterises the second type) also impacts on the scale and speed of environmental and public health problems (the first type). This is surely true, but still does not entirely undermine the distinction between issues in respect of which the lack of a global concerted action is likely to cause serious natural disasters (like global warming or pandemic diseases), putting under risk basic standards of human existence, and issues that, in theory, the countries may choose not to interfere with or even to regulate through much weaker integration (in areas like commerce etc.), without causing comparably serious harms. In the former case, there is not much choice to leave the matter untouched, whereas in the latter, arguably, countries could opt to step back at a lower level of integration. Whereas one involves inescapable natural causality, the other is a product of human convention. The distinction may be important to show that environmental problems have a greater degree of urgency than other global commons and may justify more experiments in modes of transnational authority.

<sup>324</sup> Nye claims: “The solutions to many current issues of transnational interdependence will require collective action and international cooperation. These include ecological changes (acid rain and global warming), health epidemics such as AIDS, illicit trade in drugs, and terrorism. Such issues are transnational because they have domestic roots and cross international borders.” (1990, 163-164)

<sup>325</sup> The assumption that the world would not be better off if countries, unilaterally, decide to reduce their GHGs emissions can be defended by reference to the results of three model simulations. These simulations calculate how much global temperatures could decrease if one major emitter (US, India, or China) reduces up to 100% of its GHGs emissions from business-as-usual by 2200. The results are

Alan Boyle notes that, with respect to the global environment, the old notion of sovereignty “no longer meets contemporary needs.”<sup>326</sup> In the field of climate change, the case for transnational coordinating bodies, whatever institutional features they have, seems to be the strongest. Such bodies, together, would have to avoid the irrational outcome that tends to be produced by atomised, inward-looking and self-interested state actions. The sum of rational individual actions (if we take ‘rational’ as ‘self-interested’), in the absence of external rules that bind all agents and coordinate their actions, is collective irrationality.<sup>327</sup> That is the gist of the prisoner’s dilemma.<sup>328</sup>

Building international coordination is not an elementary task.<sup>329</sup> The hierarchical legal mechanisms that create authority within nation-states are not available in that broader domain. Not, at least, and for the time being, with the same capacity of enforcement, as the previous chapter has argued. Nonetheless, states have not stayed inert in the face of such difficulty and have been trying to live up to that task through the use of creative international law instruments. In the next section, I will depict the type of coordination the international community has so far provided to address climate change. The question of whether the current arrangement of coordination is the appropriate collective answer to that global common threat remains open.

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quite modest. An utopian reduction of 100% of US GHGs emissions by 2200, for example, would result in a reduction of global warming of only 0,15 degree Celsius. (Røgeberg et al., 2010, 184)

<sup>326</sup> Alan Boyle argues that “(b)ecause these problems affect other states and the global environment, the traditional concept of territorial sovereignty within which states have been free to pursue their own national development policies, no longer meets contemporary needs.” (1993, 95)

<sup>327</sup> As Keohane and Victor say, global commons “are therefore not self-managing; promoting sustained cooperation requires formal institutions involving rules and social norms”. (2010, 9)

<sup>328</sup> Dworkins grasps it in the domain of international law: “We are already seized by devastating prisoners’ dilemmas: about terrorism, climate change, Internet communication, and economic policy. If we had an entirely different form of international organization – a worldwide federal system, for instance, with a supreme parliament – we could attack those problems through comprehensive global legislation. The unmitigated Westphalian system allows no comparable opportunity.” (2013, 27)

<sup>329</sup> As Henkin emphasises: “We have had some cooperation, but it has been limited in the name of sovereignty. We pursue a quest for world order, but a limited world order. We created a United Nations, but it is a limited United Nations. We have a World Bank and an International Monetary Fund and other specialized agencies, and they are all limited, not only in achievement but even in aspiration, by a persistent addiction to this notion of sovereignty”. (1999-2000, 3)

### 3. The Climate Change Regime

The big picture of the Climate Change Regime can be divided into three major phases.<sup>330</sup> The first phase led to the adoption of the FCCC, in 1992, which lays the legal foundation of the Regime, but did not create any coercive mechanism to control the greenhouse gases emissions, or GHGs. The second phase is inaugurated by the adoption of the Kyoto Protocol, in 1997. The Kyoto Protocol has thickened the governance regime to address climate change by defining clear targets and a timetable, from 2008 to 2012, for developed countries (“Annex I countries”) to reduce emissions. The last phase deals with the future steps of the regime. What should be done as the Kyoto Protocol’s first commitment period expired in 2012? The 2009 Copenhagen Accord, the 2010 Cancun Agreements, the 2011 Durban Platform, and the 2012 Doha Decisions are components of this last period. In what follows, I will discuss these stages and point to the deadlocks that hinder progress in climate negotiations.

#### *3.1 Mobilisation around the scientific advice*

Climate change has initially emerged as a scientific concern. In the early 60s, scientists discovered increasing anthropogenic emissions of gases that trap the heat in the atmosphere, such as carbon dioxide, methane, and nitrous oxide.<sup>331</sup> Climate change only transcended the scientific milieu and reached the political domain when a group of scientists, associated with the World Meteorological Organization (WMO), were successful in publicising the growing scientific body of evidence around climate change and its alarming consequences, such as unusual warming trends of global temperatures. The creation of the intergovernmental body (IPCC), in 1988, by a joint resolution of the United Nations Environmental Programme (UNEP) and the WMO, to assess the scientific aspects of climate change, signalled the intention of

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<sup>330</sup> Bodansky, 2010, 231.

<sup>331</sup> Agrawala explains: “The role of human activities in increasing greenhouse gas concentrations has come under growing scrutiny only since the late 1950s when monitoring of atmospheric carbon-dioxide concentrations began in Antarctica and Hawaii.” (1998a, 606) See also Bodansky and Rajamani, 2013, 4-5; Skodvin and Andresen, 2011, 166.

governments to finally engage with the scientific community and strive for concerted action.<sup>332</sup>

In 1990, a resolution from the United Nations General Assembly established an Intergovernmental Negotiating Committee, through which states should agree on “an effective framework convention on climate change, containing appropriate commitments”.<sup>333</sup> Such resolution indicated the United Nations Conference on Environment and Development (UNCED), in 1992, as the deadline for completing a first stage of international cooperation on the issue.<sup>334</sup>

### ***3.2 Framework Convention on Climate Change (FCCC)***

As expected, the FCCC was adopted at the 1992 UNCED, held in Rio de Janeiro. At that time, the international community was deemed mature enough to start negotiating framework conventions. Framework conventions, says Bodansky, have an inherent “catalytic role” – they prepare the groundwork for tougher and specific measures being issued with a subsequent protocol.<sup>335</sup> Put differently, such frameworks denote an incremental technique of international lawmaking and institution-building. Doubtful states tend to accept more easily general governance regimes that do not pose an immediate threat to their sovereignty.<sup>336</sup>

In line with such framework approach, the ultimate objective of the FCCC is that its 195 parties<sup>337</sup> stabilise the “greenhouse gas concentrations in the atmosphere at a level that would prevent dangerous anthropogenic interference with the climate system.”<sup>338</sup> Such objective is considered ambitious, and the majority of nations in the world agree towards the need to stabilise GHGs.<sup>339</sup> The message becomes weaker, however, when the FCCC attempts to establish the safety threshold for

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<sup>332</sup> See Bodansky and Rajamani, 2013, 6, and also Skodvin and Andresen, 2011, 167. Agrawala says: “An important point which is often overlooked is that the IPCC was the product of an intensely political process within the US and the UN system. The specific purpose for setting it up was also political: to engage governments worldwide in climate change decisionmaking.” (1998a, 617)

<sup>333</sup> UN General Assembly, A/RES/45/212, paragraph 1.

<sup>334</sup> UN General Assembly, A/RES/45/212, paragraph 7.

<sup>335</sup> Bodansky, 1993, 495. To Brunnée, the “‘framework-protocol’ model has established itself as the MEA approach that is most commonly used to foster conditions under which common understandings of the problem at hand can be developed”. (2002, 7)

<sup>336</sup> Bodansky says that the FCCC is actually a middle ground between a framework and a protocol. It stops short of establishing specific emissions control. (1993, 496)

<sup>337</sup> Which correspond to “almost all nations of the world” (Skodvin and Andresen, 2011, 171)

<sup>338</sup> FCCC, article 2.

<sup>339</sup> Skodvin and Andresen, 2011, 170-171.



concentrations, which is “at a level that would prevent dangerous anthropogenic interference with the climate system”. To decide on what the word “dangerous” actually means in the context of climate change has been a complicated task.<sup>340</sup> In 2009, the majority of states that were present in Copenhagen hinted, with the support of scientific evidence, that a global temperature change above “2 degrees Celsius” amounts to a dangerous interference with the climate change.<sup>341</sup>

The FCCC established the principle of “common but differentiated responsibilities and respective capabilities”, according to which all parties should protect the climate, but developed countries “should take the lead”.<sup>342</sup> This principle has legitimated the division of obligations, under the Climate Change Regime, between developed and developing countries ever since.<sup>343</sup>

The culprit of climate change, which is the increasing levels of GHGs concentration in the atmosphere, was seen as the end product of industrialization – a process initiated by developed countries.<sup>344</sup> Developing countries argued, then, that it would be only fair to attribute to developed countries the main responsibility to take the necessary measures to avoid global warming.<sup>345</sup> Hence, developed countries were given additional obligations under the FCCC. First, they have to provide financial and technical assistance so that developing countries can comply with their new

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<sup>340</sup> Skodvin and Andresen observe: “The word ‘dangerous’, however, is ambiguous and contested”. (2011, 171) Pershing and Tudela also comment: “Translating ‘dangerous’ into concrete terms is anything but clear-cut. It requires consensus on the level of acceptable risk, an inherently political determination resting on value judgments.” (2003, 18)

<sup>341</sup> Copehagen Accord, paragraph 1, reads as follows: “We underline that climate change is one of the greatest challenges of our time. We emphasise our strong political will to urgently combat climate change in accordance with the principle of common but differentiated responsibilities and respective capabilities. To achieve the ultimate objective of the Convention to stabilize greenhouse gas concentration in the atmosphere at a level that would prevent dangerous anthropogenic interference with the climate system, we shall, recognizing the scientific view that the increase in global temperature should be below 2 degrees Celsius, on the basis of equity and in the context of sustainable development, enhance our long-term cooperative action to combat climate change (...)”

<sup>342</sup> FCCC, article 3, paragraph 1.

<sup>343</sup> FCCC, article 3, paragraph 1. “This principle [common but differentiated responsibilities] has been important in the sense that it has legitimised the South’s rejection of taking on emissions commitments”. (Skodvin and Andresen, 2011, 171)

<sup>344</sup> The preamble of the FCCC conveys the historical responsibility of developed countries when it comes to GHGs emissions: “Noting that the largest share of historical and current global emissions of greenhouse gases has originated in developed countries, that per capita emissions in developing countries are still relatively low and that the share of global emissions originating in developing countries will grow to meet their social and development needs”. See also Bodansky, 1993, 479.

<sup>345</sup> Bodansky further clarifies this point when he tells that developing countries saw climate change as a “developmental” question, whereas developed countries equated climate change as an environmental problem. (1993, 479)

obligations.<sup>346</sup> Second, developed countries were also assigned a “quasi-target and quasi-timetable” to reduce emissions.<sup>347</sup> As a quasi-target, developed countries shall have the “aim of returning individually or jointly to their 1990 levels” of emissions.<sup>348</sup> The quasi-timetable indicates that such return should be done “by the end of the present decade to earlier levels of anthropogenic emissions”.<sup>349</sup>

The prefix ‘quasi’, also borrowed by Bodansky, reveals that these articles do not actually impose real targets or timetables. Werksman, in turn, adopts the expression “constructive ambiguity” to refer to these commitments, since they “create the impression of bindingness, without holding countries to any specific change in behaviour”.<sup>350</sup> As we can see below, the vagueness of obligations referring to emissions reductions would be subject to further negotiations among the parties to the FCCC.

The guiding principles of the FCCC include, among others: the protection of the climate system for the benefit of present and future generations; attention to specific needs and circumstances of developing countries; the necessity to take precautionary measures, even in the absence of scientific certainty, to mitigate and adapt to the consequences of climate change; and, finally, the right to a sustainable development, which suggests that any measure against climate change should take into consideration the economic development of each party.<sup>351</sup>

All parties to the FCCC, irrespective of being developed or developing countries, have to discharge a set of commitments. Most importantly, they have to produce national inventories of anthropogenic emissions, and to formulate and implement national programmes with the view of combating global warming. In addition, the FCCC encourages continuous production of scientific knowledge about

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<sup>346</sup> FCCC, article 4, paragraphs 3, 4, 5, and 7. There are two classes of developed countries in the FCCC. Those entitled to provide financial and technical assistance (the Annex II parties) were members of the OECD (Organisation for Economic Co-operation and Development), in 1992. FCCC, Parties & Observers, 2012.

<sup>347</sup> Bodansky, 1993, 512. According to Bodansky, the United States were the main opponent to the adoption of “targets and timetable”. Instead, they argued that a “bottom-up” approach would be more equitable in terms of costs and national circumstances. (1993, 514)

<sup>348</sup> FCCC, article 4, paragraph 2(b). This goal is imputed to the second class of developed countries in the FCCC, the Annex I parties, who are the OECD countries plus those undergoing the process of transition to a market economy. FCCC, Parties & Observers, 2012.

<sup>349</sup> FCCC, article 4, paragraph 2(a). Bodansky explains the content of the “quasi-target and quasi-timetable” of the FCCC. (1993, 515-517).

<sup>350</sup> Werksman, 2010, 675.

<sup>351</sup> FCCC, art. 3 paragraphs 1, 2, 3 and 4.

climate change and the establishment of channels for the exchange of information.<sup>352</sup> In general terms, these commitments aspire to expand the understanding of the phenomenon through the documentation of data and domestic policies furnished by each state.<sup>353</sup>

The Conference of the Parties (COP) is the “supreme body” of the FCCC. Every year, the COP meets to supervise the implementation of the Convention and to decide on whether further actions are needed to effectively implement it. The COP has a dynamic and reflexive function.<sup>354</sup> Its decisions should take into consideration the social, economic and environmental effects of the parties’ implementation of their obligations, and the current developments of science and technologies against global warming.<sup>355</sup> As of November 2012, the COP has met eighteen times and its decisions have had an important role in the development of the Regime. The COP created subsidiary bodies, implemented the Kyoto Protocol, and organised new rounds of negotiations.

The decision-making authority of the COP is based on its “Rules of Procedure”.<sup>356</sup> The parties to the FCCC have not decided whether they will allow matters of substance being decided by a majority vote, or if they will maintain the current arrangement, which is to take decisions by consensus only.<sup>357</sup> Some authors have criticised the current voting rules, as they allow a small minority to block necessary decisions and ascribe them disproportional power.<sup>358</sup> That is what happened to the 2009 Copenhagen Accord. The document is the outcome of the fifteenth COP. Instead of being adopted, as an actual decision, by the COP, the Copenhagen Accord was “taken note of”, since it did not manage to gather consensus around its terms. As

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<sup>352</sup> FCCC, article 4, paragraph 1.

<sup>353</sup> See Bodansky and Rajamani, 2013, 18.

<sup>354</sup> Brunnée argues that the COP and its counterpart, the COP/MOP, have evolving law-making roles under the Climate Change Regime. As a way to make sense of their legitimacy, according to the traditional “consent-based framework” of international law, the COPs’ mandates should be probed through different theoretical lenses. Brunnée says that it is mainly the ongoing interactional process, rather than the formal consent, that attributes to international norms the potential to influence state conduct. (2002, 4-7)

<sup>355</sup> FCCC, article 7, paragraph 2, in particular (a) and (e).

<sup>356</sup> FCCC, Adoption of the Rules of Procedure.

<sup>357</sup> See FCCC, Adoption of the Rules of Procedure, Rule 42.

<sup>358</sup> According to Bodansky, if COP was ambitious enough, then its decisions would be taken by a majority vote: “By participating in an institution that allows decisions to be made by a qualified majority vote, or that establishes bodies with limited membership (...), a state accepts a process that can result in decisions that it opposes.” (2010b, 122)

for its status, the Copenhagen Accord is a political rather than a legal agreement, and it does not have “an official status as a UNFCCC document”.<sup>359</sup>

In the wake of the FCCC, demands for intensifying the commitments of developed countries gained momentum. At the second meeting of the COP, in 1996, the heads of delegations specifically called for “quantified legally-binding objectives for emission limitations and significant overall reductions within specified time-frames.”<sup>360</sup>

### **3.3 Kyoto Protocol**

The plea for stronger commitments led to the adoption of the 1997 Kyoto Protocol, which came into force only in 2005, after Russia’s ratification.<sup>361</sup> In a mandatory and clear language, the Protocol determines that developed countries shall ensure that their emissions “do not exceed their assigned amounts (...) with a view to reducing their overall emissions (...) by at least 5 per cent below 1990 levels in the commitment period 2008 to 2012.”<sup>362</sup> Thanks to the Kyoto Protocol, then, each developed country has acquired its own emissions target – the “quantified emission limitation or reduction commitment”,<sup>363</sup> and a five-year period to achieve it.

The success in assigning legally binding targets to developed countries had been, however, partially offset by the absence of the United States in the deal and by the lack of commitment of the largest emerging emitters, like China, India, and Brazil, to switch to a low-carbon path of development.<sup>364</sup> Despite such flaws, which taint the

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<sup>359</sup> Werksman and Herbertson, 2010, 115. See below the discussion about the importance of legal agreements to international law.

<sup>360</sup> The Geneva Ministerial Declaration, paragraph 8.

<sup>361</sup> Kyoto Protocol, art. 25, paragraph 1, determines that the Protocol shall enter into force only when “55 per cent of the total carbon dioxide emissions for 1990 of the Parties included in Annex I, have deposited their instruments of ratification, acceptance, approval or accession.”

<sup>362</sup> Kyoto Protocol, art. 3, paragraph 1.

<sup>363</sup> Kyoto Protocol, Annex B. As Baumert explains, each party’s emissions target is different. There are countries allowed to increase emissions above 1990 levels, and Iceland is one of them, and countries required to reduce emissions below 1990 levels, such as the European Union. (Baumert, 2006, 372-373)

<sup>364</sup> Nordhaus argues: “The Kyoto Protocol is defective on both spatial and temporal efficiency criteria because it omits a substantial fraction of emissions (thus failing the spatial criterion) and has no plans beyond the first period (thus failing the temporal dimension of the cost-effectiveness criterion). The two largest emitters (the United States and China) are not included in the current protocol.” (2007, 33) The absence of the US and other big emitters is not the only complaint. According to Skodvin and Andresen: “Further weakening the significance of the commitments is the fact that emissions from aviation and shipping are not included.” (2011, 173)

effectiveness of the deal, the Kyoto Protocol managed to create original mechanisms, subsidiary bodies and procedures in order to set its wheels in motion.

The first marker of such institutional ingenuity had been the three market-based mechanisms to reduce the costs of implementation with emissions targets. They are the *Joint Implementation* (JI), the *Clean Development Mechanism* (CDM), and the *Emissions Trading* (ET).<sup>365</sup> These market mechanisms allow, at a lower cost, the trading of credits for emissions reduction. These credits can be generated from climate-friendly projects put forward either by developing countries (through the CDM) or by developed countries (through the JI). Alternatively, still, emissions credits can also be traded between developed countries themselves (through the ET). At the end, developed countries can use these credits to comply with their targets.<sup>366</sup>

The second marker of the institutional originality of the Kyoto Protocol is the robustness of its compliance procedure. A strong non-compliance procedure was specially designed to “facilitate, promote, and enforce compliance”.<sup>367</sup> A compliance committee can declare an Annex I party to be in non-compliance with its commitments. Such decision must be supported by a technical assessment of the situation, which is prepared by experts.

The Marrakesh Accords, which consist in a set of decisions taken at the seventh meeting of the COP, in 2001, were responsible to put the Kyoto Protocol into action.<sup>368</sup> The Accords detailed, for example, the rules and guidelines of the market-based mechanisms, as well as the procedures relating to compliance.

The ultimate decision-making authority of the Kyoto Protocol is also the COP. However, with respect to this task, it serves as the Meeting of the Parties (MOP), due to its different composition of members.<sup>369</sup> It is mandated to review the

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<sup>365</sup> Kyoto Protocol, articles 6, 12 and 17.

<sup>366</sup> Brunnée maintains: “The main arguments in support of the transfer mechanisms are that they provide avenues for more efficient and cost-effective emission reductions. Countries that face high compliance costs can elect to acquire lower-cost reductions (or emission units) elsewhere and thus reduce the need for emission reductions at home. The expectation is that market dynamics will create incentives to both generate tradable reductions and find lower cost domestic solutions that reduce the need to acquire emission units abroad.” (2003, 269)

<sup>367</sup> Decision 27/CMP.1, Objective.

<sup>368</sup> According to Decision 1/CP.7, the Marrakesh Ministerial Declaration, paragraphs 1: “the decisions adopted by the seventh session of the Conference of the Parties in Marrakesh, constituting the Marrakesh Accords, that pave the way for the timely entry into force of the Kyoto Protocol;”

<sup>369</sup> Kyoto Protocol, article 13, paragraphs 1 and 2.

implementation of the Kyoto Protocol and to make the necessary arrangements to effectively implement it.<sup>370</sup>

### ***3.4. Copenhagen, Cancun, Durban and Doha: new patterns?***

The necessity of agreeing on a forward-looking regime ahead of 2012 has recently troubled the negotiations. Two forums were conceived to deal with the issue – one under the FCCC, and the other under the Kyoto Protocol.<sup>371</sup>

In 2007, the COP adopted the “Bali Action Plan”, which aimed at engaging the parties in further negotiations on the effective implementation of the FCCC, through the newly constituted subsidiary body, the “Ad Hoc Working Group on Long-term Cooperative Action under the Convention”. The Bali Action Plan envisaged deliberation on important points, such as: a “long-term global goal for emission reductions”; “nationally appropriate mitigation commitments or actions” for developed countries and “nationally appropriate mitigation actions” for developing countries; adaptation measures; technical and financial resources.<sup>372</sup> By that time, the Kyoto Protocol had already established, in 2005, its own “Ad Hoc Working Group” to consider “further commitments for Parties included in Annex I for the period beyond 2012”.<sup>373</sup> The future of the Climate Change Regime, which should have the form of an “agreed outcome”,<sup>374</sup> was left to be decided at the fifteenth COP, in Copenhagen.<sup>375</sup>

Copenhagen did not deliver what many had initially expected or hoped.<sup>376</sup> Those who were aspiring to close the deal with a legally binding agreement like the FCCC and the Kyoto Protocol, had to compromise and accept an essentially political and non-consensual instrument instead, the Copenhagen Accord.<sup>377</sup> The longing for

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<sup>370</sup> Kyoto Protocol, article 13, paragraph 4.

<sup>371</sup> Bodansky, 2010, 232-233.

<sup>372</sup> Bali Action Plan, paragraph 1 (a), (b) i and ii, (c), (d), (e).

<sup>373</sup> Decision 1/CMP.1, paragraph 1.

<sup>374</sup> Rajamani explains the uncertainty that surrounds the term “agreed outcome [...] indicates a lack of agreement on both the legal form that the likely outcome of this process could take, and the level of ambition that it should reflect”. (2012, 503)

<sup>375</sup> Bali Action Plan, paragraph 1.

<sup>376</sup> Dubash and Rajamani report: “Never before had an international negotiation attracted 125 heads of state and government, and expended as much political capital, yet failed to deliver in quite so spectacular a fashion. And never before had outcomes been this dramatically misaligned with popular expectations.” (2010, 593)

<sup>377</sup> See Decision 2/CP.15, Copenhagen Accord.

stronger legal mechanisms was frustrated. In international relations, legally binding agreements represent the strongest effort of sovereign states to generate coordination through the means of law and legal institutions. States reinforce such commitment by promoting the necessary international and domestic arrangements to further develop and legitimise the deal.<sup>378</sup>

Negotiations in Copenhagen revealed the extent and nature of disagreements on elementary issues, such as the architecture of the future Climate Change Regime, which revolves between top-down and binding targets *versus* bottom-up and national voluntary targets,<sup>379</sup> and the level of legal obligations to which developed and developing countries should be subjected. While developed countries were pushing for “legal symmetry”, developing countries wanted to maintain their “legal differentiation”.<sup>380</sup> In the end, the Accord distanced itself from the Kyoto Protocol and moved towards a bottom-up approach, inasmuch as countries, both developed and developing, have to list their own objectives for reducing their emissions. It also promoted more symmetry among developed and developing countries, although many differences in their duties persist. For the first time, developing countries have to register mitigation actions that aim at tackling climate change.

Despite the uncertain and weak status under the United Nations process, the Copenhagen Accord is surprisingly hailed as a landmark in negotiations.<sup>381</sup> For the first time, an agreement has struggled to follow the IPCC scientific advice by

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<sup>378</sup> According to Werksman, legally binding agreement or LBA “is the highest expression of the political will of the LBA’s Parties to take the agreement and its subject matter seriously. For many countries, entering into an LBA requires parliamentary ratification and thus becomes binding and enforceable domestically through implementing legislation.” (2010, 673) As for the institutional structure that is promoted with an LBA, Werksman claims: “Finally, and perhaps most importantly, LBAs can generate – through the mandates provided to their Conference of the Parties and other institutions under the COP’s authority – new and more specific guidelines and rules that promote the harmonization of standards around reporting and implementation, can encourage a more consistent deployment of financial resources, and can maintain public, media and diplomatic pressure on the progressive development of the regime.” (2010, 674) In the same vein, Bodansky recalls: “Ultimately, what makes a norm ‘hard’ is not that violations can be sanctioned, at least in the way that we ordinarily mean, or that the norm can be applied by courts. Instead, what matters is the state of mind of the actors that comprise the relevant community— what we referred to earlier as the actor’s internal point of view—a sense that the norm represents an obligation and that compliance is therefore required rather than optional.” (2010b, 101) Apart from the legal form, Bodansky alludes to other elements that, if they are present in a treaty, indicate stronger levels of commitments, such as: more precise norms, longer agreement’s duration, international supervision and enforcement. (2010b, 180)

<sup>379</sup> About the architecture, see Dubash and Rajamani, 2010, 594-596.

<sup>380</sup> Werksman, 2010, 672.

<sup>381</sup> As Werksman and Herbertson maintain: “For the first time in the climate change negotiations, all major emitters, including more than ninety developed and developing countries, have come forward with pledges that reflect what they are willing to do to reduce greenhouse gas emissions.” (2010, 109-110)

establishing a limit for the change in global temperatures, which is below 2 degrees Celsius. Such limit, allegedly, would avoid a “dangerous anthropogenic interference with the climate system.”<sup>382</sup>

In order to reach the aforementioned limit, of course, there should be significant cuts in global emissions. Forty-two Annex I countries have “committed to implement” quantified emissions targets, listed by Appendix I, until 2020.<sup>383</sup> Such targets will be “measured, reported and verified in accordance with existing and any further guidelines adopted by the Conference of the Parties.” The objective of such process is to produce “rigorous, robust and transparent” targets.<sup>384</sup> As for the non-Annex I countries, forty-three of them have listed, in Appendix II, their “mitigation actions”, which they “will implement”.<sup>385</sup> These mitigations actions may be subject to international or domestic “measurement, reporting and verification”. The international scrutiny only applies if developing countries seek international support for their mitigation actions. Apart from that, a domestic measurement, reporting and verification takes place and its results should be communicated “with provisions for international consultations and analysis under clearly defined guidelines that will ensure that national sovereignty is respected”.<sup>386</sup>

In terms of financial help, the Accord promised to generate “new and additional, predictable and adequate funding”. More precisely, developed countries have collectively committed themselves to provide \$30 billion for developing countries’ adaptation and mitigation measures, as well as \$100 billion a year by 2020 “in the context of meaningful mitigation actions and transparency on implementation”. A “Green Climate Fund” was established to manage a great part of such funding.<sup>387</sup>

The following step of negotiations was the 2010 Cancun Agreements – a consensually adopted decision by the COP that, as for its consensual status, can be said to be in contrast with the Copenhagen Accord. The Cancun Agreements are

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<sup>382</sup> Copenhagen Accord, paragraphs 1 and 2.

<sup>383</sup> These targets are listed in “Compilation of economy-wide emission reduction targets to be implemented by Parties included in Annex I to the Convention”, FCCC/SB/2011/INF.1/Rev.1.

<sup>384</sup> Copenhagen Accord, paragraph 4.

<sup>385</sup> The mitigation actions are listed in the “Compilation of information on nationally appropriate mitigation actions to be implemented by Parties not included in Annex I to the Convention”, FCCC/AWGLCA/2011/INF.1.

<sup>386</sup> Copenhagen Accord, paragraph 5.

<sup>387</sup> Copenhagen Accord, paragraph 8.



considered to be an extension of the latter.<sup>388</sup> There was no breakthrough, but they were, nevertheless, applauded for bringing negotiations back in line with the United Nations process.<sup>389</sup> They incorporate both the emission targets put forward by Annex I parties to the FCCC,<sup>390</sup> and also the mitigation actions to be implemented by the non-Annex I parties by 2020.<sup>391</sup>

The crucial doubt with respect to the Copenhagen and Cancun pledges has been whether they are sufficient to hold the change of global temperatures below the 2 degrees Celsius limit. Although these pledges reduce the level of emissions that would have occurred in the absence of those measures (what is usually called a “business as usual scenario” of emissions), studies have concluded that they are still not enough to avoid a global warming above the 2 degrees Celsius.<sup>392</sup> More ambitious targets and actions would be necessary to achieve such goal. Yet, timid targets are not the only problem. The absence of clarity with respect to their implementation makes the assessment of what is to be achieved a difficult task as well.<sup>393</sup>

The 2011 Durban Decisions focus on the period after 2020. The new “Ad Hoc Working Group on the Durban Platform for Enhanced Action” was established to lead a process to “develop a protocol, another legal instrument or an agreed outcome with legal force under the Convention applicable to all Parties”.<sup>394</sup>

This decision is quite emblematic. Not only is it the launching of a new set of climate negotiations, without the two forums established by the Bali Action Plan, but it makes no reference whatsoever to the principle of “common but differentiated

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<sup>388</sup> Skodvin and Andresen note: “the substance of the Agreement is fairly similar to the Accord.” (2011, 182) Bodansky refers to both documents as “Copenhagen/Cancun”. (2012, 2)

<sup>389</sup> Skodvin and Andresen note: “Most analysts see a positive development in the Cancun Agreement, as it is, in contrast to the Accord, embedded in the UN system”. (2011, 176)

<sup>390</sup> Cancun Agreements, paragraph 36.

<sup>391</sup> Cancun Agreements, paragraph 49.

<sup>392</sup> “Although the country pledges help in reducing emissions to below a business-as-usual level in 2020, they are not adequate to reduce emissions to a level consistent with the 2°C target, and therefore lead to a gap.” (UNEP, 2011, 8)

<sup>393</sup> Levin and Finnegan argue that “many of these pledges do not specify aspects such as which sectors or gases are covered, which methodologies are used for estimating expected reductions, if applicable, and/or the role of offsets. Without this and other information, it is challenging to track progress towards fulfillment of pledges, to ensure transparency, to estimate resulting emissions reductions, and to assess whether overall global emissions reductions are adequate for meeting global temperature limits.” (2011, 1)

<sup>394</sup> Durban Platform, paragraph 2.

responsibilities and respective capabilities”.<sup>395</sup> In fact, in two different opportunities, the Durban Platform underlines “all Parties” as the subjects of its provisions.<sup>396</sup>

During the last COP, held in Doha, in 2012, two recently launched reports, one from UNEP and the other from the World Bank, provoked outspoken reactions among parties and non-governmental organisations. The first reveals the gap between the countries’ pledges to reduce emissions and the objective to avoid global warming above 2°C.<sup>397</sup> The second calculates that the world is, actually, in the path of getting 4°C warmer, if no other measures to reduce emissions are devised and implemented.<sup>398</sup> The preamble of the Doha Decisions urged the parties both not to forget such downside and to take action in order to achieve the common global goal.<sup>399</sup>

Doha also advanced the deadline for concluding negotiations initiated with the Durban Platform: by 2015, in Paris, a “protocol, another legal instrument or an agreed outcome with legal force”, applicable to all parties, should be adopted with a view to coming into effect from 2020.<sup>400</sup>

The decision to establish “institutional arrangements”, which might include an international mechanism “to address loss and damage associated with the impacts of climate change in developing countries that are particularly vulnerable to the adverse effects of climate change” was celebrated in the aftermath of the COP.<sup>401</sup> Such institutional arrangement, however, is still in its infancy, and the objective so far is to gather data and build up knowledge with respect to actions and techniques that help us address the problem.

At Doha, the parties finally managed to extend the Kyoto Protocol to a second commitment period, from 2013 to 2020, as it has already been foreseen in Durban.

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<sup>395</sup> Bodansky, 2012, 2-3. Rajamani, 2012, 507-508.

<sup>396</sup> Like in the following passages: “Also decides to launch a process to develop a protocol, another legal instrument or an agreed outcome with legal force under the Convention applicable to all Parties” (Durban Platform, paragraph 2); “Decides to launch a workplan on enhancing mitigation ambition to identify and to explore options for a range of actions that can close the ambition gap with a view to ensuring the highest possible mitigation efforts by all Parties” (Durban Platform, paragraph 7).

<sup>397</sup> UNEP, 2011.

<sup>398</sup> “Indeed, present emission trends put the world plausibly on a path toward 4°C warming within the century” (World Bank, 2012, xiii).

<sup>399</sup> See Doha Decisions, CP.18, “Agreed Outcome pursuant to the Bali Action Plan”.

<sup>400</sup> See Durban Platform.

<sup>401</sup> See “Approaches to address loss and damage associated with climate change impacts in developing countries that are particularly vulnerable to the adverse effects of climate change to enhance adaptive capacity”, FCCC/CP/2012/L.4/Rev.1, paragraph 9.

Canada, Japan, and Russia did not accept the second commitment period, which was only embraced by the EU, Australia, Switzerland, and Norway.<sup>402</sup>

The first phase of the Kyoto Protocol has already attracted criticisms due to the absence of the two biggest emitters, the US and China. This time, the slice of global emissions covered by the Kyoto Protocol is even lower, which possibly indicates that the political support around its architecture is on the wane. The overall impression is that the parties have moved towards “a more flexible design”, one that embraces voluntary, bottom-up targets and actions.<sup>403</sup>

#### **4. Science, compliance, and cost-efficient emissions reduction**

The three following chapters are dedicated to the study, through the analytical lenses of accountability and GAL project, as previously defined, of three institutional actors of the Climate Change Regime: the IPCC, the CCKP, and the CDM. As already explained at the outset, two inter-related questions will be addressed: how accountable these institutions are, and how appropriate their respective accountability arrangements happen to be.

The reason for the selection of these three specific institutions should be further developed. The choice relates to the pivotal yet distinct functions each one exercises within the overall regulatory system devised by the Climate Change Regime: to inform policymaking about the state-of-the-art of scientific knowledge concerning climate change (IPCC), to promote compliance of the parties (CCKP), and to bolster cost-efficient reduction of emissions (CDM).

The IPCC, the CCKP and the CDM, just like the Climate Change Regime itself, are still in the process of experimentation and consolidation. Indeed, every single institution, however traditional it might be, is inevitably subject to further development. The institutions currently considered, though, are in a different historical stage – states are grappling to strike the right institutional mixture to deal with novel problems in a novel sphere. No matter how different these institutional

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<sup>402</sup> See Decision 1/CMP.8 “Amendment to the Kyoto Protocol pursuant to its Article 3, paragraph 9 (the Doha Amendment)”, FCCC/KP/CMP/2012/13/Add.1. Canada’s deviation from its target under the Kyoto Protocol was substantial: “The Canada’s current greenhouse gas (GHG) emissions are 23% over the country’s Kyoto protocol target, and federal government estimates place Canada 28.8% over the target by 2014.” (Doucet, 2012)

<sup>403</sup> Bodansky and Rajamani, 2013, 33.

actors might turn out in the future, the core functions they exercise are essential in the long run for any regime tailored to address climate change.

The IPCC, again, informs a broad audience about the science of climate change. It does not produce knowledge, but takes stock and translates to the political community, through reasoned assessment reports, the conclusions provided by the scientific literature on climate change. Considering that the political process is the ultimate trigger of any global response to complex environmental problems, responsible, legitimate and efficient political decisions are dependent on taking scientific evidences into serious consideration.

Scientists were the first to blow the whistle on climate change and on its tragic consequences. There are further and more recent examples of the IPCC's influence on policymaking. Since the Copenhagen Accord, the parties have agreed that a deep global emissions reduction is required so as to limit the global temperature change below 2 degrees Celsius. Such limit was established "as documented by the IPCC Fourth Assessment Report".<sup>404</sup>

The CCKP adopts a dense procedure with a view to inducing the parties' compliance with their commitments under the Kyoto Protocol. In general terms, a compliance committee, which works through the facilitative and the enforcement branches, decides on questions of implementation. Developed countries, in particular, have to report on their performance and should receive a technical review of such material, through expert review teams. The CCKP enables one party to know whether and how other parties have been implementing their share of commitments. There is an element of enhancing mutual trust. Additionally, there is also the objective of documenting and strengthening the data with respect to efforts to reduce GHGs emissions.<sup>405</sup>

Since the Bali Action Plan, in 2007, the Regime introduced the concept of "measurement, reporting, and verification" of the actions chosen by the parties to respond to climate change. According to the Copenhagen Accord, for example, both developed countries' emissions targets and developing countries' mitigations actions,

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<sup>404</sup> Copenhagen Accord, paragraph 2.

<sup>405</sup> Werksman and Herbertson talk about the benefits of the CCKP in similar terms: "transparency and accountability have been improved through monitoring and evaluation of developed country parties' performance by Expert Review Teams authorized to conduct in-country visits, deploy third-party data, and raise questions of implementation" (2010, 130)

should be “measured, reported, and verified”.<sup>406</sup> Such process is still underdeveloped under the Regime, but it has similar functions to those advanced by the CCKP. It intends to devise a set of standards against which the parties’ efforts could be measured in order to permit the mutual knowledge of each other’s performance, and to check on whether the information reported is trustworthy.<sup>407</sup>

Finally, the CDM is one of the market-based mechanisms devised under the Kyoto Protocol. It is specifically intended to structure the financing of climate-friendly projects between developing and developed countries, with the purpose of achieving cost-efficient emissions reductions. By means of the CDM, developing countries run projects that generate specific credits, the Certified Emissions Reductions, and developed countries buy these credits in order to comply with their emissions reductions commitments under the Kyoto Protocol. The cost-efficient side of this trading mechanism relates to the fact that the actual emissions reductions occur in developing countries, where the costs of building climate-friendly facilities are still cheap compared to the costs that could be incurred if similar facilities were built in developed countries.<sup>408</sup>

The continuity of market-based mechanisms in the future Climate Change Regime has gained a strong political support. The 2011 COP, in Durban, decided that a new market-based mechanism is to be created in order to “enhance the cost-effectiveness of, and to promote, mitigation actions”.<sup>409</sup>

The three institutions, in sum, are central instances of the intense institutional experimentation undertaken by international law to handle the functional demands

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<sup>406</sup> Copenhagen Accord, paragraphs 4 and 5. The Accord implies that the “measurement, reporting and verification” process applied to targets and actions are different from each other.

<sup>407</sup> On the “measurement, reporting and verification”, see Breidenich and Bodansky, 2009. These authors provide a good summary of the goals and functions of such process: “MRV can serve a wide range of purposes in a new climate agreement. It can provide an important means of tracking parties’ progress individually and collectively toward the Convention’s ultimate objective. The very process of measurement can facilitate parties’ actions by establishing baselines and helping to identify mitigation potentials. The reporting of actions can allow for their recognition internationally. The review or verification of parties’ actions can enhance action through expert advice on opportunities for improvement. MRV could play a particular role in the linkage between developing countries’ action and support for those actions. Finally, credible MRV can strengthen mutual confidence in countries’ actions and in the regime, thereby enabling a stronger collective effort.” (2009, 1)

<sup>408</sup> Wara examines the cost-effectiveness aspect of the CDM: “The CDM was designed around the insight that the marginal cost of emissions reductions in developing, and especially rapidly developing, countries would be less than those faced by developed nations. The basis for this insight was that the cost of building more efficient, lower-GHG-emitting industrial and energy facilities in the developing world would be far lower than the cost of prematurely retiring or retrofitting existing developed-world capital stock.” (2008, 1763)

<sup>409</sup> Durban Platform, paragraph 83.

that climate change lays upon global cooperative action. These functional demands comprise the challenges of 1) translating for policy-makers how science understands and measures the causal chains of climate change, 2) prompting obedience and hence inter-state coordination, and 3) operationalizing emission reductions through market-based mechanisms.

These are delicate functions for the pursuit of which the IPCC, CCKP and CDM were specifically empowered, and to which an appropriate accountability arrangement is necessarily tied. Despite not exhausting all that a climate change regime is supposed to do, and although other bodies could also be selected for this research, the three institutions have been sufficiently active and running through interesting procedural reforms, in order to allow for illuminating *intra-regime comparison*. Such functional differentiation implies the particularisation of accountability demands, which, in principle, should lead to different combination of devices..

Locating the three institutions within the typology of GAL project is not a complex task either. The place that the IPCC, CCKP and CDM occupy in the map of international law is not as extravagant or conceptually disturbing as other novel institutions spotted by the GAL project might be (like the hybrid or intermestic institutions). They are part of “international administration”<sup>410</sup> and their administrative tasks are exercised within a formal intergovernmental arrangement.

## **5. The structure of the following chapters**

The thesis scrutinises three institutions that have been recently refining their respective decision-making procedures. It considers their respective accountability regimes and shows the extent to which these reforms can be apprehended as iterations of GAL. GAL project, for sure, does not provide the only conceptual lenses through which one can observe them, but enables the analyst to perceive relevant features.

The three following chapters share a common structure. This structure comprises two descriptive steps and one evaluative step. They couple, in other words, a detailed depiction of these institutions with some conjectures about their appropriateness and room for transformation.

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<sup>410</sup> Kingsbury et al., 2005, 7.

The first descriptive step addresses the ‘institutional configuration’, which comprehends the identification of the purpose, actors and decisional processes in place. Put differently, it explains the institutional mandate, draws its organogramme (who is who) and its flow chart (how they interact: who does what, when and how). The second descriptive step purports to interpret the ‘accountability structures’ through the coordinates delineated by the first chapter. That is, it tells a similar story from a somewhat different angle, fleshing out the descriptive blueprint earlier systematised: Who accounts to whom? For what and how? When? On the basis of which standards? Under pain of what consequences? The evaluative step, in turn, proceeds through a ‘test of appropriateness’, according to the general framework outlined by the previous chapter.

The design of the 3 bodies can partly be seen as 3 particular iterations of GAL principles. Whether ‘GAL for science-policy dialogue’ (IPCC), ‘GAL for compliance’ (CCKP) and ‘GAL for finance’ (CDM) have any significant difference in procedural terms is a question to be checked.<sup>411</sup>

It is not clear how a “fully emerged” GAL will eventually look like, assuming that this is the route through which global bodies will develop. Its proponents expect some degree of homogeneity in heterogeneity, some degree of unity in diversity. It remains to be investigated whether something close to that achievement is present within the sector of climate change. The GAL’s framework invites institutional introspection and facilitates intra-regime comparison. I will rehearse that introspection in the next three chapters.

## **6. Conclusion**

Climate change is believed to be among the most challenging global environmental problems to date. As seen above, climate negotiations face many obstacles before reaching a regime that keeps the world away from a “dangerous anthropogenic interference with the climate system”.<sup>412</sup>

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<sup>411</sup> Chesterman, for example, considers that the “procedural remedies” of transparency, rights of participation and review “do not exist for the Basel Committee, the Kyoto Protocol’s Clean Development Mechanism (...)”. (2009, 79)

<sup>412</sup> FCCC, art. 2.

One of these obstacles is the deepening of the conflict between developed and developing countries. Developing countries have been pushed to engage more actively in tackling climate change, since their share of global emissions is on the rise.<sup>413</sup> The interpretation of the principle “common but differentiated responsibilities” has been, and is likely to remain, a hotly contested issue.<sup>414</sup>

In addition, negotiations have become harder because of the political reverberations of the topic. Public support around it, though, has been dwindling. From 2005 to 2008, climate change occupied the terrain of “high politics”, as Andersen and Skodvin have understood it. It was a priority on many political meetings, first of all, due to the stronger scientific consensus about the problem, and second, because of the current grasp of climate change’s dire consequences: “tropical storms, shrinking glaciers, and pictures of polar bears looking for ice”.<sup>415</sup> This ascendant trajectory, however, reversed after the outbreak of the global economic crisis in 2008. The public consciousness about climate change tends to oscillate between hesitating scepticism and outright denial. A recent BBC poll shows that the number of people who believe climate change is really happening and is the result of human behaviour has dropped from 41% to 26%.<sup>416</sup>

In any case, the Climate Change Regime, already twenty years old, is a sign that the “crew” is not just arguing, but starting to act.<sup>417</sup> However modest, still messy, and far from sufficient that action might be, what is emerging is an institutional architecture that needs to be studied under well-crafted concepts and probed through plausible normative assumptions.

The analysis that follows in the next three chapters intends to better understand the functioning of essential bodies of the still dynamic international Climate Change Regime. It is not far-fetched to assume that a credible flow of

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<sup>413</sup> “The fastest growth until 2025 is projected in developing countries, whose collective emissions are projected to rise 84 percent (compared to 35 percent growth for industrialized countries). By 2025, the developing country share of global emissions is projected to be approximately 55 percent (compared to 48 percent in 2000).” (Baumert et al., 2005, 17)

<sup>414</sup> Dubash and Rajamani explain the anxiety that pierces climate politics: “The UNFCCC, born of the earlier period, sits uneasily in today’s world of level playing fields. The developing world is undoubtedly far better placed – economically and politically – than in 1992, and it is disingenuous to pretend otherwise. But it is equally problematic to deny that there remain vast disparities between developing countries, and heavy burdens of underdevelopment within many developing countries, both of which buttress the salience of differentiations as a concept.” (2010, 598)

<sup>415</sup> Skodvin and Andresen, 2011, 165.

<sup>416</sup> BBC climate change poll, February, 2010.

<sup>417</sup> I am here referring to the metaphor that was quoted at the epigraph of this chapter: “While the crew is arguing, the ship is getting closer to the rocks.” (Dessler and Parson, 2006, 177).



scientific information, an effective practice of states' compliance with its obligations, and a successful market-based mechanism may create better conditions for cooperation between states. Testing and improving the accountability configurations of the IPCC, CCKP and the CDM are, thus, necessary steps towards fulfilling that demanding expectation.

## Chapter 4

### The Intergovernmental Panel on Climate Change (IPCC): holding science and policymaking to account

*“The science of the situation is clear –  
it’s time for the politics to follow.”<sup>418</sup>*

#### 1. Introduction

The Intergovernmental Panel on Climate Change (IPCC) is the cornerstone of the Regime Complex for Climate Change.<sup>419</sup> It was set up in 1988, by a joint resolution by the United Nations Environmental Programme (UNEP) and the World Meteorological Organization (WMO).<sup>420</sup> Its responsibility is to politically test what science tells us with respect to climate change. More precisely, it is an institution for the political certification of the scientific evidences on the basis of which global action can be envisioned and worked out. Its institutional mission is to “assess on a comprehensive, objective, open and transparent basis the scientific, technical and socio-economic information relevant to understanding the scientific basis of risk of human-induced climate change, its potential impacts and options for adaptation and mitigation.”<sup>421</sup>

The climate change has been considered a serious issue for more than 50 years. About 30 years ago, due to its disquieting consequences, climate change has entered the international political agenda. It has only become a prime political issue, however, through the momentous series of IPCC assessment reports.<sup>422</sup> Since its inception, the IPCC has managed to build, despite the strident handful of climate-sceptics, a non-negligible consensus around key factual claims: 1) that climate change is indeed occurring,<sup>423</sup> 2) that it is, to a large extent, the product of human activity,<sup>424</sup>

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<sup>418</sup> Hanse (2012).

<sup>419</sup> Keohane and Victor (2010).

<sup>420</sup> WMO (1998) and UNEP (1997). For a detailed account of the IPCC history, see Agrawala (1998a and 1998b).

<sup>421</sup> IPCC, 1998, paragraph 2.

<sup>422</sup> Skodvin and Andresen, 2011, 165. Agrawala (1998a).

<sup>423</sup> The Summary for Policymakers of the IPCC Fourth Synthesis Report maintains that “Warming of the climate system is unequivocal, as is now evident from observations of increases in global average air and ocean temperatures, widespread melting of snow and ice and rising global average sea level.” (IPCC, 2007, 2).

and 3) that, unless effective mitigation and adaptation plans emerge,<sup>425</sup> the environment, hence mankind itself, will be seriously threatened.<sup>426</sup> The key role of the IPCC within the Climate Change Regime is reflected in most related institutional documents: the FCCC,<sup>427</sup> the Kyoto Protocol,<sup>428</sup> and the Principles Governing IPCC Work.<sup>429</sup>

This chapter will look into how the procedures of the IPCC attempt to enable it to fulfil its central role of policy advice-giving. It proceeds through three major steps. First, I describe the IPCC institutional edifice, which comprises the purpose, the correlated actors and their interacting processes. Second, I explicate that same institutional structure through the language of accountability that has been developed by the first two chapters. Thirdly, I put forward an evaluative account of the appropriateness of such institutional structures and the archetypes it seeks to bring about. Along this assessment, I consider how the normative lenses of GAL project might illuminate the IPCC accountability and the direction of its past reforms.

At first sight, it sounds suspicious to contend that science should be accountable to politics. It might correctly seem that it should be the other way around. However, the claim that scientists should not be accountable to politicians passes over the institutional nuances of the IPCC. The phenomenon of accountability, as I have previously argued, is not an all-or-nothing matter. Rather than questioning *whether* the IPCC should be accountable, the relevant inquiry is to know *how* that might be appropriate without affecting the integrity of the scientific enterprise. Accountability is not so much a choice as it is an almost inevitable fact of the exercise of power, and it becomes an even heavier burden at the stage of high-profile global decision-making. The IPCC exercises a tremendous non-coercive power of attesting what science can credibly claim about climate change already. The present chapter will investigate how its institutional structure engenders bidirectional accountability relationships between scientists and politicians.

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<sup>424</sup> “Most of the observed increase in global average temperature since the mid-20<sup>th</sup> century is very likely due to the observed increase in anthropogenic GHG concentrations.” (IPCC, 2007, 5)

<sup>425</sup> “There is high confidence that neither adaptation nor mitigation alone can avoid all climate change impacts; however, they can complement each other and together can significantly reduce the risks of climate change.” (IPCC, 2007, 19)

<sup>426</sup> IPCC, 2007, 9-10.

<sup>427</sup> FCCC, art. 21 (2).

<sup>428</sup> Kyoto Protocol, art. 5 (2) and (3).

<sup>429</sup> IPCC, 1998, paragraph 1.

## 2. Institutional configuration

### 2.1 Purpose

The purpose of the IPCC can be conceived both at a general and at a practical dimension. Generally speaking, the IPCC mediates between science and politics in order to digest, translate and synthesize what the former knows about climate. It is ultimately about “policy advice-giving”, a multifaceted task that consists in 1) certifying whether and how climate change is happening, 2) gauging what impact it might precipitate on natural and social life, and 3) reckoning what can be done to adapt, mitigate or even to avert it.<sup>430</sup> The IPCC is, in other words, a “scientific intermediary” on that particular matter of global concern.<sup>431</sup>

More practically and straightforwardly, this means that the IPCC has to deliver a periodic assessment report about the state-of-the-art of scientific knowledge on the phenomenon of climate change, apart from occasional special reports or papers that might be commissioned for more precise inquiries.<sup>432</sup> Taking stock of the latest and cutting-edge scientific literature, therefore, is the kernel of its institutional responsibility. The IPCC neither discovers nor produces new knowledge properly so called. Its process is rather one of scrutiny, confirmation and public authentication.

To date, the IPCC has elaborated and published four of these reports. The fifth is planned to be ready by the end of 2014.<sup>433</sup> An IPCC assessment report has a compound formal structure. It is made up of the separate reports and the respective summary for policymakers (SPM) produced by each of the three working groups (WG), and also by a synthesis report (SYR) and its own summary for policymakers. The SYR “distills and integrates” the main conclusions of the three WG reports.<sup>434</sup>

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<sup>430</sup> Bolin called it a “science advisor”: “The scientist serving in a position of science advisor must acquire insight into other aspects of the problem under consideration in order to provide the decision maker with the most essential information.” (1994a, 25)

<sup>431</sup> For Vasileiadou et al., the IPCC was established as “the primary intermediary institution to synthesize scientific knowledge for policymakers”. (2011, 1053)

<sup>432</sup> These other kinds of documents are usually made in response to requests of the COP/MOP. They are: Special Reports; Methodology Reports; Technical Papers; and Supporting Material.

<sup>433</sup> The First Assessment Report (FAR) was published in 1990, the Second Assessment Report (SAR) in 1995, the Third Assessment Report (TAR) in 2001 and the Fourth Assessment Report (AR4) in 2007. The release of the Fifth Assessment Report (AR5) is scheduled for December 2014. See IPCC, 2008, item 4.

<sup>434</sup> Pachauri, 2007.

This means that, altogether, the IPCC report consists of eight different pieces. The four summaries for policymakers play a crucial and sensitive political role. Because they are supposed to orient political agents that are working on the ground, they need to be written in a style that is non-technical, intelligible and accessible to the general public.<sup>435</sup>

The interrelation between science and policymaking in contemporary international law and politics, indeed, goes far beyond climate change. This is not a novel conclusion, and we can conjure up several examples thereon. Scientific evidence, for instance, has sparked a number of controversies involving state-members to the World Trade Organization Agreements. One well-known case is the dispute promoted by Canada and the United States against the European Community because of the ban, upheld by the latter, on importing meat products from cows treated with hormones. According to the European Community, the justification of the ban has been constructed on the basis of scientific evidence that meat products containing hormones were harmful to human health.<sup>436</sup> In another oft-cited example, the International Whaling Commission, in 1982, established a moratorium of commercial whaling thanks to the lack of scientific certainty as to what could be considered a sustainable catch limit of whaling stocks.<sup>437</sup>

These examples indicate how scientific knowledge may play a relevant role in the making and evolvement of various areas of international law. This entwined relation, however, is not as plain as it may seem, and some further clarification on the ways in which science can have a bearing on international policymaking is helpful to grasp this dynamics.

Scientific evidence does not, by itself, trigger collective action.<sup>438</sup> It is the political process, rather than science, that shapes collective responses towards phenomena diagnosed by science. There are, indeed, cases in which the enacted norms and policies adopt a precautionary approach towards the issue at hand, exactly because of the absence of scientific evidence beyond reasonable doubt. The Whaling Regime is an example thereof. The subordination of scientific knowledge to politics,

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<sup>435</sup> IPCC, 1999, Definitions.

<sup>436</sup> European Communities - Measures Concerning Meat and Meat Products (Hormones). Complainants: United States (WT/DS26) and Canada (WT/DS48).

<sup>437</sup> Information provided by the International Whaling Commission at: <http://www.iwcoffice.org/commission/iwcmmain.htm#committee>

<sup>438</sup> See Andresen and Skjaerseth (2007).

for sure, should not be seen as a problem *per se*. After all, it is in the context of the political sphere that individuals can hope to govern and to be governed as equal and autonomous, yet inter-dependent, beings. Nonetheless, one would hardly dispute that, first, science should be produced free from political interference and, second, that responsible political decisions should take scientific evidences into serious consideration rather than strategically ignore or manipulate them on the basis of self-interest.

Andresen and Skjaerseth carried out an enlightening empirical work about this interrelation. After scrutinising five multilateral environmental agreements, they pondered over how science had been essential not only to *spot the nature* of the problem underlying each regime, but also to *advance possible solutions* or collective interventions.<sup>439</sup> This dual role, however, does not exhaust their explanation. The authors also report that the relationship between scientific findings and collective responses tends to follow a certain pattern. This pattern hinges upon how intense controversies the evidences might stir, and how readily available or costly the solutions are.

When it comes to constructing a collective response, the authors list the elements that might increase or decrease the chances of scientific knowledge being followed. According to them, if a problem revolves around a less controversial piece of scientific knowledge, if the potential or actual harm is tangible and easily visible,<sup>440</sup> and if there is a cheaper available technology to substitute the existing harmful technologies, scientific evidence is more likely to be observed. The problem is deemed easier to solve and convergence from states becomes less troubling. On the other hand, when these premises do not obtain, there will likely be meager chances for scientific evidence to shape the regime. A harder political process, then, ensues.<sup>441</sup> This dynamics is not, indeed, so surprising or counter-intuitive, but it hints at the complex tensions that concrete cases might prompt. Apparently, climate change belongs to the latter category, hence its political and legal intricacy.

Science, with more or less degree of certainty depending on the specific issue, reveals important causalities with regards to the global warming phenomenon. It may

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<sup>439</sup> Andresen and Skjaerseth, 2007, 190. The five analysed regimes were: Whaling, Ozone, Marine and Air Pollution, and Climate Change

<sup>440</sup> Such as the increase of skin cancer triggered by the depletion of the ozone layer. (Barrett, 2003, 228)

<sup>441</sup> Andresen and Skjaerseth, 2007, 193.

even go beyond its factual role and propose a way to better forestall the problem at stake: what the greener energy alternatives are, what sorts of adaptation and mitigation plans the countries could use, and so forth. At the end of the day, however, it is up for political and legal institutions to deal with these evidences, envisage the plausible scenarios, manage the respective risks and, above all, take responsibility for the choices that are made. Policymakers have to contemplate how to deal with the reduction of carbon emissions. They have to decide, for example, whether they should finance alternative energy sources or create a climate market and so forth.

Bodansky rightly contends that “decision making depends not only on what is scientifically known about climate change, but also on a non-scientific judgment about how to act in the face of uncertainty”.<sup>442</sup> This does not mean that science will only have a limited impact on the design of the international climate change regime. The history of political institutions, national or international alike, has vastly shown otherwise.

The IPCC and, thus, the scientific input it has produced so far, was essential to provoke the political mobilisation and concrete actions with respect to climate change, however modest, with hindsight, they might have been. The IPCC has been placed in a strategic position to persuade and influence decision-makers through its reports.<sup>443</sup> Therefore, further inquiries into what processes should command the production of scientific advice for authoritative decision-makers are in order.

As it happens, while the IPCC is not unique for connecting science with policymaking, it is rather singular for its scope and scale: as a matter of *scope*, it covers an entire scientific field that cuts across the multiple disciplinary boundaries surrounding the question of climate change; as a matter of *scale*, it embraces the causes and effects of climate change on a global perspective. The function of the IPCC, thus, is both *encyclopaedic* in substantive terms and *all-inclusive* in geographic terms.<sup>444</sup>

The tension between science and politics is embedded in the IPCC identity, inoculated in its DNA and inescapably reflected in its institutional structure. This tension might be virtuous or counter-productive, rewarding or harmful in informing

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<sup>442</sup> Bodansky, 1999, 622.

<sup>443</sup> Andresen and Skjaerseth, 2007, 194.

<sup>444</sup> Vasileiadou et al. contend that the IPCC has a “general ‘encyclopedic’ function as the most authoritative resource in the field.” (2011, 1059) Skodvin also reflects upon the unique breadth and magnitude of the IPCC. (2000, 409)

policymaking. The fact that the IPCC recognises itself as “policy relevant but not policy prescriptive or policy driven”<sup>445</sup> does not reduce such permanently latent risk. The IPCC equilibrates itself on this volatile tightrope. Through the design of its structure and processes, it needs to find a way that enables the body, colloquially speaking, to “have the cake and eat it”: to protect scientific integrity by incorporating science into the process, without setting politics aside. It settles the apparent oxymoron of “quality scientific assessments by democratic consensus”.<sup>446</sup> This feat has not been pursued without hostilities and fierce antagonists, and the short history of the body, as we shall see, has neither been one of flagrant failure nor of unqualified success.

## 2.2 Actors

The institutional structure of the IPCC boldly mirrors that close entanglement between science and politics. Unsurprisingly, *scientists* and *politicians* are the two natural actors that operate the machinery of the IPCC. These two generic groups, however, come up under various forms and are allocated in different bodies with specific responsibilities. Scientists might be more or less directly involved with the assessment reports. They may enter the process as either lead authors, contributing authors, peer reviewers or review editors. Political representatives, in the same way, might be called to participate and contribute in different stages of the process.

The IPCC operates in *three basic levels*. The Panel is the ultimate political decision-making organ where government representatives assemble at plenary sessions once a year. Below the Panel, there are three working groups (WGs), the job of which is divided according to a thematic area.<sup>447</sup> Working Group I (WGI) is in charge of the “physical science basis”, Working Group II has the task of assessing “impacts, adaptation and vulnerability”, and Working Group III evaluates the literature regarding “mitigation of climate change”.<sup>448</sup> Each WG, therefore, raises an independent sort of scientific question that is, of course, interconnected with many other questions. First, what is the relationship between anthropogenic activities and

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<sup>445</sup> IPCC, 2001, appendix 2, paragraph 2 (a).

<sup>446</sup> Agrawala, 1998a, 606

<sup>447</sup> Skodvin, 1999, 17-18.

<sup>448</sup> IPCC, 2008, item 4.



climate change? Second, how does climate change impact the conditions of communal living in different parts of the world and how should we act so that we adapt to it? Third, can the ongoing process of climate change be attenuated? The sum of these questions, which should be answered through the interaction between scientists and politicians, fittingly encapsulates the institutional ambition of the IPCC.

The Panel, therefore, is the first and top level of decision-making. The other two levels are internal to the WGs: the second is the WGs plenaries and the third is the WGs respective writing teams. The WGs plenaries promote the official encounter between political representatives and a selected group of scientists that contributed to the report drafting. The writing teams, in turn, are composed by lead authors and contributing authors, and also assisted and probed, along the process that will be described below, by peer reviewers, government reviewers and review editors.

Surrounding the Panel and the WGs, there are four administrative bodies: the Bureau, the Executive Committee, the Secretariat, and Technical Support Units (TSU). The Bureau comprises the IPCC Chair, the Vice-chairs and the Chairs of the WGs, who are elected by government representatives at a single Panel session. This group should embody a “balanced geographic representation with due consideration for scientific and technical requirement”.<sup>449</sup> They are elected for one term, which represents the period during which an assessment report is prepared.<sup>450</sup>

Bureau members have a set of responsibilities. They provide scientific and technical guidance to the Panel, develop and agree on the list of experts who will work to produce the assessment reports, oversee the scientific quality of the reports, and perform editorial tasks.<sup>451</sup> The Secretariat provides the day-to-day organisation of the body. It arranges the sessions of the Panel, the Bureau, the Executive Committee, and the WGs, manages funds, and helps with travel expenses.<sup>452</sup> Each WG is also assisted by one technical support unit.

An Executive Committee was recently created with the purpose of strengthening the implementation of the IPCC’s activities between the sessions of the Panel. Among its responsibilities, it has to oversee the responses to potential errors in

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<sup>449</sup> IPCC, 1998, paragraph 5.

<sup>450</sup> IPCC, 2006, Rule 8 and Rule 10.

<sup>451</sup> IPCC, 2011, Annex A, Terms of Reference of the Bureau.

<sup>452</sup> IPCC, 2012, Functions of the IPCC Secretariat.

the previously completed assessment report.<sup>453</sup> The Chair, the Vice-chair, and the Co-chairs of the WGs compose this Executive Committee. The head of the Secretariat and the heads of the TSUs are “advisory members”.<sup>454</sup> The Executive Committee has to submit a report of its activities to the Panel and to the Bureau.<sup>455</sup>

As an external actor, the Subsidiary Body for Scientific and Technological Advice (SBSTA) was created to provide the COP with “timely information and advice on scientific and technological matters relating to the Convention”.<sup>456</sup> Composed mainly by government representatives, the SBSTA is mandated to draw upon “existing competent international bodies”.<sup>457</sup> In fact, the SBSTA turned out to be a vehicle for the flow of information between the IPCC’s conclusions and the COP.<sup>458</sup>

This overall structure might raise, and has already sparked, some suspicion and anxiety. After all, science and politics, for the sake of the former’s autonomy, are usually set in separate vessels. Yet, the IPCC was designed to promote this partnership, however tense and uneasy that might become. The active participation of government representatives throughout the assessment process would strategically serve to facilitate the political approval of scientific conclusions and recommendations.<sup>459</sup>

These three levels are supposed to pull a long line of gradual distension between “pure science” and “pure politics”.<sup>460</sup> The “impurity” of that mixture was the ingenious solution furnished by IPCC designers in order to carve a space of conversation, persuasion and consensus-building without corrupting the core independence of the scientific endeavour.<sup>461</sup>

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<sup>453</sup> IPCC, 2011, Governance and Management, 2.3.2 (c).

<sup>454</sup> IPCC, 2011, Governance and Management, 2.3.3.

<sup>455</sup> IPCC, 2011, Governance and Management, 2.3.4 (i).

<sup>456</sup> FCCC, art. 9, paragraph 1.

<sup>457</sup> FCCC, art. 9, paragraph 2.

<sup>458</sup> Yamin and Depledge, 2004, 465, and Bodansky 1993, 536. See also information at: <http://unfccc.int/bodies/body/6399.php>. This role became clearer with Decision 6/CP.1, through which the COP expressly established the link between the SBSTA and the IPCC. According to such decision, the SBSTA has to: “(s)ummarize and, where necessary, convert the latest international scientific, technical, socio-economic and other information provided by competent bodies including, inter alia, the Intergovernmental Panel on Climate Change (IPCC), into forms appropriate to the needs of the Conference of the Parties, including in support of the review of the adequacy of commitments;”. (Decision 6/CP.1, Annex 1, 1(a))

<sup>459</sup> Agrawala, 1998b, 627.

<sup>460</sup> See the useful three-layered diagram drawn by Skodvin and Alfsen, 2010, 5.

<sup>461</sup> Houghton recounts: “I am often asked to explain how it is possible for so many scientists from different countries and cultures to come to a consensus about a subject as complex and uncertain as

## 2.3 Process

The IPCC process aims for nothing less than to make the scientists liaise with the policymakers at the same table. Before we describe the core process of drafting, reviewing and approving the assessment reports, it is important to describe the ancillary process that has been issued by the IPCC itself for the appointment and enrolment of its actors and participants.

### 2.3.1 Constituting the IPCC: rules of membership and appointment

Governments and participating organisations provide the names of the experts. The names are, then, assembled into lists and made available to all IPCC members. The respective WG selects the experts from the lists according to their scholarly publications and works. The large group of coordinating lead authors, lead authors, contributing authors, peer reviewers and review editors must be indicative of a *balanced representation* from developed, developing, and countries with economies in transition.<sup>462</sup>

A set of criteria determines the selection of experts. They have to embody wider scientific, technical and socio-economic expertise, geographical diversification and gender balance. There should be a mixture of experts with and without experience in the IPCC. A report on how the selection process took place should be sent to the Panel.<sup>463</sup>

Non-governmental and other intergovernmental organisations, either national or international, and “qualified in the matters covered by the IPCC”, can participate, under Panel’s approval, as observers in various kinds of meetings of the IPCC and of the WGs.<sup>464</sup> These organisations can have an active involvement in the IPCC activities: they are invited to identify experts for each area of the report together with

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climate change. My reply is that science, with its emphasis on robust data, repeatability, balance, accuracy and integrity and its reliance on argument and debate to reach a conclusion, provides an ideal process for such an endeavour.” (2008, 738)

<sup>462</sup> IPCC, 1999, paragraphs 4.3.1 and 4.3.2.

<sup>463</sup> IPCC, 1999, paragraph 4.3.2.

<sup>464</sup> IPCC, 2006b, paragraph 1.

government representatives,<sup>465</sup> and even to contribute “in their own right” with comments and opinions.<sup>466</sup>

### 2.3.2 *The assessment cycle*

The so-called “assessment cycle” comprises three elemental collective tasks: (i) scientists, under diverse status within the process, are in charge of drafting the respective documents; (ii) political representatives, in turn, have the chance to provide inputs and, at final stages, endorse those previously prepared drafts; (iii) in between, peer reviewers and government reviewers suggest occasional corrections to the drafts. The separation between these three tasks – writing, reviewing and upholding – implies that there might be slight (and rhetorically relevant) differences between the “draft report”, the “reviewed draft report”, and the “final report”. It is only the latter that receives the IPCC official imprimatur and is launched for the assimilation of the public. This separation is a crucial device for understanding the terms of the relationship between scientists and politicians.

If one takes a closer look, nonetheless, one can realise that these three elemental tasks are actually distributed along seven phases: (i) the ‘scoping meeting’ of the Panel, which opens the assessment cycle by outlining its exact focus and setting its overall schedule; (ii) the report drafting by writing teams; (iii) the first review, by expert peer reviewers; (iv) the second review, by government reviewers; (v) the redrafting, in the light of the comments of reviewers, by the respective writing teams and with the assistance of review editors; (vi) the WG plenaries, for endorsement acts; and (vii) the Panel plenary, for endorsement acts and for ‘scoping’ the next cycle. In the two latter plenary phases, as will be later explained, the documents are subject to different procedures of formal “*endorsement*”: “section-by-section *acceptance*”, “line-by-line *approval*” and “section-by-section *adoption*”.

The drafting phase of an assessment report involves a large number of experts who exercise different responsibilities and authority. The Fourth Assessment Report, for example, congregated 800 contributing authors, 450 lead authors, and 2.500 peer reviewers, all of whom worked on a voluntary basis.<sup>467</sup> The coordinating lead authors

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<sup>465</sup> IPCC, 1999, paragraph 4.3.1.

<sup>466</sup> IPCC, 2006b, paragraph 10.

<sup>467</sup> IPCC, 2010b.

are in charge of overseeing and ensuring the overall coherence of the report. The lead authors are in charge of writing pre-commissioned chapters. The contributing authors provide the technical input to be considered by the lead authors.<sup>468</sup> These reports should take into account primarily peer-reviewed and published literature, but some exceptions to this general rule are now accepted by the IPCC, as will be explained further below.<sup>469</sup>

Once the draft report is ready, a two-stage back-and-forth review process takes place. Expert peer reviewers scrutinise the content and balance of the drafts and have to comment “on the accuracy and completeness” of the reports.<sup>470</sup> In order to fulfil this responsibility, the reviewers can request any “material referenced in the document being reviewed”.<sup>471</sup> Based on these commentaries, the drafts are revised by the writing teams and, then, sent to the next round of review. This phase replicates the conventional mode of self-regulation, which is the main tool for quality control within the scientific community. It is a “link” between the designated authors and the general scientific community.<sup>472</sup>

The government review, in turn, is performed by a number of departments and ministries within a member-state and it aims at analysing the accuracy and completeness of the draft report.<sup>473</sup> While the first round of review remains within the scientific community, since only experts are entitled to participate, the second round is undertaken both by government representatives and by the experts.<sup>474</sup> It is the first opportunity for political input, a way “to intercept conflicts before the reports reach WG plenaries”.<sup>475</sup>

Three principles inform such review process. First, the review should aim at gathering “the best possible scientific and technical advice”. Second, the work should be subject to a “wide circulation process”, in which a variety experts, from developed and developing countries, who have not participated in the preparation of that

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<sup>468</sup> IPCC, 1999, Annex 1, paragraphs 1, 2 and 3.

<sup>469</sup> IPCC, 1999, Annex 2

<sup>470</sup> IPCC, 1999, Annex 1, paragraph 4.

<sup>471</sup> IPCC, 1999, paragraph 4.3.4.1.

<sup>472</sup> Skodvin, 1999, 26.

<sup>473</sup> IPCC, 1999, Annex 1, paragraph 6.

<sup>474</sup> IPCC, 1999, paragraph 4.2.

<sup>475</sup> Skodvin, 1999, 27.

particular chapter, are invited to take part in the process. Third, the process should be “objective, open, and transparent”.<sup>476</sup>

Lead authors have to analyse, incorporate (or justify why not to incorporate) the comments prepared by both experts and government representatives. Review editors are in charge of overseeing this two-stage review phase. They help in selecting expert peer reviewers, check whether the reviewers’ comments were “afforded appropriate consideration” and assist lead authors in handling contentious opinions on scientific matters.<sup>477</sup> They also gather, in consultation with the writing team, peer reviewers and government reviewers in order to face “particular points of assessment or areas of major differences”.<sup>478</sup> Of great importance is the determination that any sound disagreement should be singled out in the report, particularly if it is “relevant to policy debate”.<sup>479</sup> Review editors, in short, allow for the “separation between writing and reviewing”,<sup>480</sup> a principle that strengthens impartiality.

After the second round of review, each of the three authors’ team, assisted by their respective review editors, prepare the reviewed draft of the report. Such report and its summary for policymakers have to be endorsed by each WG plenary in order to move to the Panel for final approval. The main participants of these WG plenaries are governmental representatives.<sup>481</sup> Coordinating and lead authors have also acquired throughout the years an active role in these deliberations. Substantive changes in the drafts are not made without their consent, which enables them to keep a level of control over the final text.<sup>482</sup> Decisions at the WG sessions have to be taken by consensus. Exceptionally, if consensus is not possible, “differing views shall be explained and, upon request, recorded”.<sup>483</sup> It might also be possible, when disagreement cannot be dissolved, to qualify statements in footnotes.

The reports and the accompanying summary for policymakers are treated differently during the WG sessions.<sup>484</sup> The report itself is not subject to close scrutiny

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<sup>476</sup> IPCC, 1999, paragraph 4.3.4.

<sup>477</sup> IPCC, 1999, Annex 1, paragraph 5.

<sup>478</sup> IPCC, 1999, paragraphs 4.3.5.

<sup>479</sup> IPCC, 1999, paragraph 4.3.5.

<sup>480</sup> Skodvin, 2000, 411.

<sup>481</sup> IPCC, 1999, paragraphs 2 and 4.4.

<sup>482</sup> Skodvin, 1999, 20-21 and IAC, 2010, 23. “Coordinating lead authors should be consulted in order to ensure that the Summary for Policymakers is fully consistent with the findings in the mains report”. (IPCC, 1999, paragraph 4.4)

<sup>483</sup> IPCC, 1998, paragraph 10.

<sup>484</sup> IPCC, 1999, paragraph 4.4: “The Summaries for Policymakers should be prepared concurrently with the preparation of the main Reports”.

since “the large volume and technical detail of this material places practical limitations upon the extent to which changes (...) will normally be made”.<sup>485</sup> Without much discussion, the report, which consists of a comprehensive view on the matter, gets “accepted”. The summary for policymakers, on the other hand, undergoes a cumbersome and painstaking deliberative process, in which the wording of the text is subject to detailed examination. Each summary for policymakers has to be subject to “approval”, a time-consuming and line-by-line discussion of its content.<sup>486</sup>

The summary for policymakers is the document that usually gets broadly exposed to the global press and the general public. It is not difficult to understand, thus, why it receives such an intense political scrutiny. Representatives from the south, the north, the small islands, and from the oil exporting countries, with their opposite views and interests and stakes on climate change, have to achieve a common denominator regarding the content of the document.<sup>487</sup>

According to Skodvin, the need for consensus among politicians, despite the risk of harming the scientific credibility of the whole enterprise, is actually what makes the final document stronger. Skodvin empirically shows that the polarised arguments of government representatives tend to “somehow outweigh each other” and reach an equilibrium.<sup>488</sup> Besides, coordinating and lead authors ensure that any suggestion for rephrasing a certain conclusion is in accordance with the substantive findings of the respective report, and hence help keeping the respectability of the final document. Scientific findings are “tried out and digested by policy-makers”.<sup>489</sup> The concrete effect of this interactive process, Skodvin remarks, is the actual assimilation and embrace of the scientific knowledge by the political community.

After the WG plenaries, there comes the seventh and final stage. The Panel sessions, in some way, are both the end and the beginning of the process that leads to the assessment reports. The Panel sessions give the final endorsement to the report

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<sup>485</sup> IPCC, 1999, paragraph 4.5.

<sup>486</sup> IPCC, 1999, paragraph 2. Agrawala ironically compares such process of approval to “a fox-trot performed by a drunken couple: one lurch forward, followed by a sideways stagger, then a stumble backwards”. (1998b, 627)

<sup>487</sup> And, indeed, as Agrawala recalls, the “final negotiated statements from such sessions are often based on least common denominator conclusions written in carefully hedged language.” (1998b, 627)

<sup>488</sup> Skodvin, 1999, 21. In the same vein, the IAC report contends that “participating governments may have diverse political agendas that might cancel each other out”. (IAC, 2010, 23)

<sup>489</sup> Skodvin, 1999, 21. According to Agrawala, the conclusions of the summary for policymakers may present “carefully hedged language” but nonetheless are “scientifically defensible”. (Agrawala, 1998b, 627)

elaborated by the WGs and, in scoping meetings, set up plans for the next assessment cycle, defining the breadth, scope and structure of the future report.<sup>490</sup>

The SYR is put down by a distinct writing team. This team, which must embody broad technical expertise, geographical representation, and gender balance, is selected and led by the IPCC Chair. The SYR, as noted earlier, comprises a somewhat condensed, or matter-specific, version of the three WGs reports and a joint summary for policymakers. It follows a procedure that, to a large extent, replicates the one that takes place at the level of WGs. Once more, the summary for policy makers will pass through another line-by-line approval process.<sup>491</sup> The main difference lies in the adoption process of the condensed report. Government representatives must review it “section-by-section”, meaning one page, or less, at a time. Changes may be required at that stage. Review editors must analyse how the writing team implements the changes vis-à-vis the content of the assessment reports of the three WGs. The revised version of the condensed report is then submitted for “adoption”.

Formally, the approval and adoption of the SYR is held at the Panel plenary, hence among government representatives only. However, in the fourth and last assessment cycle, the IPCC decided to send the final draft of the SYR to observers’ organisations, which were encouraged to provide their scientific and technical comments before the draft was finally submitted for the regular endorsement by government delegates.<sup>492</sup>

The final content of an overall assessment report (and, in different degrees, of each of its eight pieces), therefore, is the product of an exhaustively debated writing process. Apart from acknowledging disagreements, the IPCC is also concerned with accurately recognising and communicating the level of uncertainty of its conclusions.<sup>493</sup> Science for policymaking is doomed to be, most of the time, “frontier knowledge” rather than “core-knowledge”, that is, relies on insufficiently proved

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<sup>490</sup> Agrawala, 1998b, 623. See also Yamin and Depledge, 2004, 475.

<sup>491</sup> IPCC, 1999, paragraph 4.6.1.

<sup>492</sup> IPCC, 2007b.

<sup>493</sup> Hassalman (1995) ruminates on the delicate nature of the assessment report: “It reflects the main view of the whole scientific community, and also conveys the degree of variability around that average view.” On the importance of the recognition of uncertainty, Bolin stated: “The key question remains: How to recognize the inherent uncertainty of the climate change issue, but still address key issues of mitigation of and adaptation to a likely change of climate in the future? This dilemma is not likely to be resolved in the near future.” (1994a, 29) Later, responding to a dismissively sceptical article by Sonja Boehmer-Christiansen, Bolin (1995) once more stressed: “The IPCC has always emphasized the uncertainty of our knowledge and it is grossly unfair to describe its work as a ‘skilful exercise in scientific ambiguity’. Uncertainty is a reality and it does not diminish risk.”



hypotheses rather than on indubitable and stabilised knowledge.<sup>494</sup> Over the years, the IPCC has published guidance notes on how lead authors should deal with uncertainties consistently and credibly. In the Fourth Assessment Report, for example, authors were cautioned against “trivializing statements just to increase their confidence”.<sup>495</sup>

Such provisions, which point out the need to keep uncertainties transparent, are pivotal in the context of science about climate change, which has matured over time but has not yet answered a number of central questions. Uncertainties still abound in the literature, and the overcoming of uncertainties demands institutional strategy and prudence to perceive not only the differing political sensitivities but also sheer cognitive dissonances.<sup>496</sup>

Studies on the economic effects of climate change offer a useful example. The challenge of this type of research is to quantify and monetise the impact climate change will have on the health system, the agriculture, and the biodiversity of a certain country. Unsurprisingly, there is a significant degree of doubtfulness on these questions with respect to highly contingent circumstances.<sup>497</sup> In this context, the duty of the IPCC is to convey every dimension about a certain topic, which means not only being clear on what science does and does not know, but also quantifying levels of certainty. Hiding uncertainties and drawing a prettier picture of the problem would betray the scientific ambition.<sup>498</sup>

Fairly and candidly communicating uncertainties, however, is not the only linguistic challenge of the IPCC. There have been several episodes of overscrupulous

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<sup>494</sup> Skodvin, 1999, 10.

<sup>495</sup> IPCC, 2005.

<sup>496</sup> Campbell, 2011, 4910.

<sup>497</sup> Tol, for example, contended that “(p)oliticians are proposing to spend hundreds of billions of dollars on greenhouse gas emission reduction, and at present, economists cannot say with confidence whether this investment is too much or too little”. (2009, 46)

<sup>498</sup> Having this in mind, in the circumstance of the fourth assessment cycle, the IPCC elaborated a formal guidance for addressing uncertainties. (IPCC, 2005) This document recommended an extensively categorised repertoire of expressions so that the report could be written in a calibrated language and with the greatest level of precision and candour. First, it provided a three-tiered typology of uncertainties: “unpredictability”; “structural uncertainty”; “value uncertainty”. Second, it furnished a five-tiered set of categories relating to level of confidence: “very high”, “high”, “medium”, “low” and “very low”. And thirdly, a seven-tiered scale of likelihood: “virtually certain”, “very likely”, “likely”, “about as likely as not”, “unlikely”, “very unlikely”, “exceptionally unlikely”. Each of these categories has an arithmetic expression of probability. One can see this repertoire reflected in the text of SPM of the fourth SYR: the style is sometimes forthright, outspoken and confident, but, more often, hesitant, cautious and indecisive. (IPCC, 2007, 2)

linguistic disputes during the past endorsement processes.<sup>499</sup> They probably sound like a nitpicking legalistic exercise, a pedantic deviation from the essentials of the policy-science conversation. More deeply, they reveal the importance of the rhetorical side of the reports: the way they speak is as important as what they speak.<sup>500</sup> Different kinds of stakeholders will have contrasting approaches and incentives as to the report's wording and linguistic calibration.<sup>501</sup>

IPCC parlance, thus, is a product of the interaction between, on the one hand, a detailed technology of collective drafting and conveying an accurate degree of uncertainty of the message, and, on the other, a careful wording of the scientific message so that it sounds respectful and convincing to the public. A rhetorical analysis of the successive versions between the initial draft report until the finally endorsed report would show how this interaction materialises and detect the nature of the linguistic amendments.

#### ***2.4 Responding to external pressure: the incremental evolvement***

The descriptive task is not yet finished. It is hard to give a critical account of the IPCC current structure without taking its history of incremental construction into consideration. This diachronic elucidation, interspersed with the synchronic

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<sup>499</sup> On the occasion of the panel meeting for the 2<sup>nd</sup> assessment report approval (held in Madrid, in November 1995), the draft summary for policymakers stated that “(m)ore convincing evidence for the attribution of a human effect on climate is emerging from pattern based studies”. The panel spent more than 2 hours discussing whether “more convincing” or, under request of Saudi Arabia and Kuwait, “some preliminary” reflected more accurately what they wanted to convey. In the end, they reached the formulation “More convincing recent evidence...”, with a footnote that registered the dissenting opinion of the two oil-producing countries. Another famous linguistic dispute related to the second report revolved around whether there was a “discernible”, “detectable” or “appreciable” human influence on global climate. The correspondent statement of the third and fourth reports, years later, shifted to a probabilistic expression: the former contended that climate change is “likely” to be caused by anthropogenic greenhouse gases, and the latter said it is “very likely”. (see Houghton, 2008, 737-738; Vasileiadou et al, 2011, 1059; Skodvin, 1999, 20)

<sup>500</sup> Campbell casts light on the tension between the writer's intention of precision and the reader's comprehension. That tension might ultimately be solved by contextually-crafted rhetorical sensibility, one that anticipates how the particular audience will receive the message: “The values of openness and transparency in communication to stakeholders and publics, not to mention a modicum of due humility, necessitate an explicit acknowledgement of scientific uncertainties. But this obligation flies in the face of a strong concern that expressed uncertainties can themselves undermine public trust. Resolution of this contradiction depends on the context and on how you tell it.” (2011, 4892)

<sup>501</sup> As Agrawala commented, small island states are expected to push for more severe language. Oil producing countries, in turn, make the best they can to cast light on the uncertainties. Developing countries concentrate on reminding the developed countries of the historical unfairness underpinning any attempt to mitigate their emissions, after more than two centuries of unchecked emissions by the already industrialised countries. Developed countries, in turn, emphasise that they are increasingly becoming lower emitters. (1998b, 627)

description provided above, is a helpful way to understand the meaning of each structural or procedural change that leads up to the current accountability arrangements.

To the extent that they help to illuminate devices and features that are useful to ground the institutional analysis, these events deserve to be mentioned. I do not intend to reconstruct the thread of institutional development in any far-reaching sense, but to see how the institution responded to some important situations of crisis that led to self-reflection and reform. I recount some episodes of public pressure to which the IPCC responded by improving its process.

The IPCC has been, one could fairly say, an institution in constant search of self-correction under pain of falling into irrelevance.<sup>502</sup> Over the years, it has faced serious public pressure with regards to, unsurprisingly, its proximity to politics. The dialectics between public pressure and institutional reform laid the ground for an incremental evolvement. This path, as we shall see, follows a single direction towards more transparency, participation, confidence-building and overall representation of the body.

Accusations of dishonesty, fraud, methodological recklessness or sheer incompetence are common since the beginning of the IPCC work. Among the lessons that can be drawn from the almost 25 years of the IPCC existence is that every assessment cycle is likely to include a credibility crisis, or, at the very least, a serious credibility trial. That has proved to be almost unavoidable. The IPCC has predictable enemies, for whom the belief that climate change is caused by human action and the practical measures recommended on the basis of such belief go against their economic interests. In the short life of the IPCC, and along the way of four assessment cycles, there were two specially noisy moments of pressure: in 1996, in the aftermath of the publication of the Second Assessment Report (SAR), and in 2009, succeeding the publication of the Fourth Report (AR4).

In 1996, when the IPCC launched the SAR, an American physicist, Frederick Seitz, declared that he had never witnessed a “more disturbing corruption of the peer-review process”.<sup>503</sup> According to Seitz, the published version of the chapter 8 of the

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<sup>502</sup> Agrawala notes that the IPCC “has shown a capacity for iterative improvements and institutional learning” by promoting a constant dialogue between the producers and the users of assessments. (1998b, 637)

<sup>503</sup> Seitz (1996).

report was rather different from the approved version at the WG plenary and at the Panel.<sup>504</sup> The text, at bottom, sounded somewhat less sceptical about the existing evidences of man-made global warming. The specific spot of criticism was that the two texts, the one officially approved and the one finally published, would have revealed a corruption of IPCC's own rules of procedure and portrayed the IPCC as a biased source of advice for governments.

In 2007, after being awarded the Nobel Peace Prize, the international reputation of IPCC reached its peak. In 2009, nonetheless, two incidents turned that favourable scenario upside down. First, the IPCC acknowledged a mistake regarding essential data about the "rate of recession and date of disappearance" of the Himalayan glaciers.<sup>505</sup> Such misreported data was picked up from a non-peer-reviewed reference: a report from the environmental group WWF.<sup>506</sup> Second, leaked emails from the University of East Anglia's Climatic Research Unit have suggested that a group of scientists, who were contributing authors to the IPCC assessment report, have supposedly manipulated data in order to produce a more pressing public assertion. That event was known as the "Climategate". At the time of the investigation, a variety of anti-scientific behaviour has surfaced, such as the "attempts to cover up flawed data; moves to prevent access to climate data; and to keep research from climate sceptics out of the scientific literature".<sup>507</sup>

According to various independent reviews, the scientists involved in the Climategate storm were cleared of malpractice.<sup>508</sup> What is worth noting, though, is how the acknowledged mistake (the misreporting of Himalayan glaciers data) and the allegedly lack of transparency and misconduct of scientists (the Climategate) had the ability to shake the positive image of the IPCC. Climategate opened room for the climate sceptics to advocate that too intrusive collective measures to tackle climate

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<sup>504</sup> One notorious protagonist of the effort to discredit the Second Assessment Report was the Global Climate Coalition, a former lobby institute of the fossil fuel industry. Ben Santer (1996), the lead author of one chapter of the Second Report, was heavily criticised for editing some sentences: "This appears to be a skilful campaign to discredit the IPCC, me and my reputation as a scientist."

<sup>505</sup> IPCC (2010).

<sup>506</sup> Guardian editorial (2010a).

<sup>507</sup> Guardian editorial (2010b).

<sup>508</sup> Lord Oxburgh's Scientific Assessment Panel remarked that "(w)e saw no evidence of any deliberate scientific malpractice in any of the work of the Climatic Research Unit and had it been there we believe that it is likely that we would have detected it". (Oxburgh et al, 2010) Russel et al. also declared that "(o)n the specific allegations made against the behaviour of CRU scientists, we find that their rigour and honesty as scientists are not in doubt." "We do not find that their behaviour has prejudiced the balance of advice given to policy makers." (2010, 11)

change are not necessary, since scientific research that indicates that, thanks to human action, the world is getting warmer is biased, unreliable and purposefully overstated.<sup>509</sup>

The IPCC has reacted to each of these moments of crisis by refining its procedures and structures. There were three significant procedural reforms by the Panel: in 1993, in 1998-1999, and in 2010. In 1988, when it was born, the IPCC had very few formalised rules of procedure. From these succinct and fragmentary “terms of reference”, they incrementally developed to its extremely codified current procedure. The two last reforms are worth mentioning.

Between the Second Assessment Report (1995) and the Third Assessment Report (2001), the Panel meetings of 1998 and 1999, apart from publicly formalising consolidated practices, also enacted some new rules, of which three were central for (i) allowing the use of non-peer-reviewed and unpublished materials by the reports, (ii) establishing “review editors” as a new actor within the writing process and (iii) creating another kind of formal endorsement for the SYR – the “adoption”.

The writing teams were still advised for the most part to consider peer-reviewed and internationally available literature.<sup>510</sup> The justification for widening the range of sources, however, was to turn the assessment report “as up-dated as possible when they eventually are published”.<sup>511</sup> From then onwards, information from the private sector could be taken into account. The previous rule assumed that only peer-reviewed or published articles entail sound and trustworthy research, but it ended up ignoring occasionally useful information. The downside of this new rule, as Skodvin warned, is that such material tends to be more “network-related” and might reinforce the impression of “IPCC as a club”.<sup>512</sup>

In view of the crisis of 2009, the IPCC perceived the need of being scrutinised by an independent institution with scientific prominence. The InterAcademy Council (IAC), a multinational organization of science academies, was asked to review IPCC’s procedures “for strengthening the capacity of IPCC to respond to future

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<sup>509</sup> As stated by an editorial of *The Observer* (2010): “Despite the sceptics, climate change must remain a priority: Public confidence will be inspired more by frankness about what science cannot explain”.

<sup>510</sup> IPCC, 1999, paragraph 4.3.3.

<sup>511</sup> “It is increasingly apparent that materials relevant to IPCC Reports, in particular, information about the experience and practice of the private sector in mitigation and adaptation activities, are found in sources that have not been published or peer-reviewed”. (IPCC, 1999, Annex 2)

<sup>512</sup> Skodvin, 2000, 413-414.

challenges and ensuring the ongoing quality of its reports”.<sup>513</sup> The final report of IAC, released in 2010, recommended a number of institutional changes and remedies to tackle that credibility crisis. It addressed, among other issues, the questions of how to correctly communicate the level of uncertainty about a topic and how to deal with non-peer-reviewed literature, as well as the need to increase the level of transparency of every decision taken in the course of the assessment process.<sup>514</sup>

The recommendations of IAC leaned towards yet more rigorous procedures for the approval of IPCC’s assessment reports. Whether the IAC’s recommendations, which are detailed below, actually improve the quality of the assessment reports, turn them less prone to mistakes and give them greater credibility to policymaking is still a matter of speculation that will be tested in the course of the fifth assessment cycle. In any event, it is crucial to observe how the regime of accountability increasingly becomes denser. I enumerate seven core suggestions made by IAC.

First, the IAC considered that the IPCC governance structure was too thin to handle the complexity of the current assessment reports. It proposed the creation of an executive committee with formal decision-making authority to act on behalf of the Panel between the plenary sessions in order to improve the timing of decisions and responses that cannot be delayed.<sup>515</sup> The plenary of the IPCC partially accepted the suggestion and created an executive committee with interstitial administrative functions. The new organ has to oversee responses to possible errors in the review process of draft reports and to strengthen the coordination between the working groups.<sup>516</sup> Originally, the IAC suggested that three independent members, outside the climate community, should be included as members of the executive committee in order to “improve the credibility and independence” of the body.<sup>517</sup> The IPCC, though, limited the composition of the executive committee to technical staff from the bureau, and left open the possibility of “invit(ing) additional individuals” to the meetings.<sup>518</sup>

Second, the IAC advised that more transparent rules were needed for selecting the writing teams. In IAC’s view, credibility can be enhanced if it is clear that an

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<sup>513</sup> IAC, 2010, Foreword.

<sup>514</sup> IAC, 2010, Executive Summary.

<sup>515</sup> IAC, 2010, 45.

<sup>516</sup> IPCC, 2011, Governance and Management.

<sup>517</sup> IAC, 2010, 46.

<sup>518</sup> IPCC, 2011, Governance and Management, paragraphs 2.3.3. and 2.3.4. (e).

expert was chosen because of her/his specific scientific credentials.<sup>519</sup> The IPCC accepted this suggestion and determined that the composition of the group of coordinating and lead authors should echo a wide range of scientific views, incorporate experts from developing and developed countries as well as from countries with economies in transition, experts with and without previous experience in the IPCC, and gender balance. The IPCC now requires a report with a detailed account of the nominations' processes and of the extent to which such diverse composition has been achieved.<sup>520</sup>

Apart from that, the IPCC has also enacted, on the basis of IAC's suggestion, a "Conflict of Interest Policy".<sup>521</sup> The Policy aims at protecting the "legitimacy, integrity, trust, and credibility of the IPCC" and at avoiding the possibility that the IPCC faces "a situation that could lead a reasonable person to question, and perhaps discount and dismiss, the work of the IPCC simply because of the existence of a conflict of interest". It applies to every actor who plays a role in the making of the assessment reports and calls for a nuanced consideration of an individual's share of responsibility. Conflict of interests refers to professional, financial and other interests that can compromise one's impartiality, impair one's appearance of impartiality or create an unfair advantage for any person or organization.<sup>522</sup>

Thirdly, although the IAC recognised the importance of including "grey literature" among the IPCC sources – that is, the non-peer-reviewed or unpublished literature, it urged the body to adopt more stringent rules regarding its use.<sup>523</sup> The IPCC responded by enacting new rules that place an extra responsibility on the writing teams to ensure the validity and quality of any information that is not peer-reviewed or published.<sup>524</sup> Authors should have a clear argument to justify the use of such literature, with particular reference to the following issues: (i) why the relevant piece of information has not been published, (ii) what it adds to the content of the report, (iii) what the qualifications of the researchers are and (iv) what type of fund they have received. Accessibility is also considered a critical matter when dealing

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<sup>519</sup> IAC, 2010, 14-15.

<sup>520</sup> IPCC, 2011, Procedures, paragraph 3.

<sup>521</sup> IPCC, 2011, Conflict of Interest Policy.

<sup>522</sup> IPCC, 2011, Conflict of Interest Policy, Appendix 1, paragraph 3, 4, 6, 9 and 11. The document also offers a set of examples of the kind of interests that should be disclosed no matter whether they might lead to a conflict of interests, like senior editorial roles, membership on boards of non-profit or advocacy groups, employment and consulting relationships, among others (paragraphs 15 and 16).

<sup>523</sup> IAC, 2010, 16-17.

<sup>524</sup> IPCC, 2011, Procedures, paragraph 4.

with grey literature. Hence, authors must provide access to any article that is cited, and the respective technical support unit should make it available on request.<sup>525</sup>

Fourthly, the IAC focused on the review process. Despite the elaborate division of labour between the actors, IAC pointed out a major weakness in it: authors and review editors have not been able to effectively spot and respond to important comments from reviewers. A major reason for such weakness is the amount of work that is demanded during the review phase. The last report is said to have attracted more than 90.000 review comments.<sup>526</sup> The Himalayan glaciers event can serve as a good example. According to IAC, the writing team did not consider two important expert comments that could have avoided the mistake. Moreover, not only did the review editors fail to ensure these comments were properly addressed, but they also failed to transpose the disagreement into the text of the report. IAC focused on strengthening the role of the review editors, who can minimise mistakes if dully attention is paid to any comment that points out “contradictions, unreferenced literature, or potential errors”.<sup>527</sup>

Furthermore, IAC suggested that a more targeted review process should be designed in order to simplify and enhance the effectiveness of the assessment cycles. In such process, review editors would have the responsibility for writing a summary of the issues submitted by reviewers, which would include three categories: most significant, noneditorial and editorial issues. The authors, in turn, would have to respond, in detail, to issues of the first category, to provide short answers to issues of the second category and none to issues of the third category.<sup>528</sup> The IPCC recognised the weight of such suggestion and issued a new guidance note on the role of review editors, which requires them to identify critical issues that are likely to spark discussion within the writing teams due to the nature of scientific controversies.<sup>529</sup> However, the IPCC has not yet amended its procedures to reflect the recommended targeted process.<sup>530</sup>

Fifthly, the IAC also explored the criteria for communicating uncertainty and found out about situations in which the IPCC failed to fulfil this task adequately.

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<sup>525</sup> IPCC, 2010d, Appendix 1, paragraphs 2 and 4.

<sup>526</sup> IAC, 2010, 3.

<sup>527</sup> IAC, 2010, 21-22.

<sup>528</sup> IAC, 2010, 18-19.

<sup>529</sup> IPCC, 2010d, Appendix 2.

<sup>530</sup> IPCC, 2011, Procedures, paragraph 6.



Some statements of WGII fourth report illustrate IAC's conclusion. WGII declared having "high confidence" in some of its predictions in spite of the fact that they were weakly supported by evidence. Their "high confidence" and allegedly "substantive finding", turned out to mislead policymakers about the evidentiary status of the data.<sup>531</sup> Pure rhetoric, in this case, was harming the ability to communicate a trustworthy and candid degree of uncertainty.

In order to avoid such ill assertions, IAC maintained that the best approach to resolve uncertainty is to use the "qualitative level-of-understanding scale". This scale evaluates any finding in accordance with two variables: the level of evidence available (limited, medium, or robust), and the degree of agreement (low, medium, or high). Two further scales should supplement judgements that involve "high agreement *and* robust evidence" and "high agreement *or* robust evidence". The first pertains to the extent of confidence of the authors' teams about the validity of the finding (very low, low, medium, high, and very high). The second scale refers to the likelihood of an outcome to obtain, and needs to quantify "uncertainty with calibrated language". On the one side of the spectrum, it can be "exceptionally unlikely", when the probability of the outcome ranges between zero and 1%. On the other side, it can be "virtually certain", when the probability of the outcome ranges between 99 and 100%. The IPCC accepted and incorporated such recommendations. To sum up, the amount of evidence and the level of agreement a conclusion gathers, the level of authors' confidence in its content and a quantified probability of its outcome are the dimensions believed to correctly and frankly transmit the level of uncertainty.<sup>532</sup>

Sixthly, the IAC also cautioned against the possibility of an escalation of political interference during the approval process. The usual prolonged sessions, for example, might benefit large and richer delegations at the cost of smaller ones. The former would be more qualified to exert greater influence on the outcomes. The line-by-line discussion of the SPM between government representatives prompted special concerns of IAC and other commentators. Despite recognising the importance of the process, the SPM still gives the impression of being a reinterpretation of the technical

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<sup>531</sup> IAC, 2010, 27-41.

<sup>532</sup> IPCC, 2010d, Appendix 4, paragraphs 8, 9 and 10. The IAC has also pointed to the differences as to the degree of certainty that literature covered by each working group might have. The literature assessed by WGI deals at length with measurements. WGs II and III examine a literature that is mainly concerned with future projections of climate change. This latter kind of literature has an inherently higher degree of uncertainty as to its conclusions. (IAC, 2010, 30-39)

report according to political considerations and tactical manoeuvres.<sup>533</sup> It would, in other words, sweeten the pill or politically sugarcoat the hard conclusions of science.

According to Agrawala, such intense plenary sessions offer one of the few opportunities that developing countries, in particular, have to hold the IPCC accountable for how it treats these countries' review commentaries during the review phase. The best way to improve the process, in Agrawala's view, would be to adopt a "significant majority" instead of "complete consensus". In that way, the IPCC would avoid being hostage to one or two governments' unpredictable views.<sup>534</sup> To date, however, no major change in the approval process of the summary for policymakers took place.

Finally, the IAC has also criticised the lack of transparent rules regarding the selection of participants for the scoping meetings and its respective decision-making process.<sup>535</sup> This criticism encouraged the IPCC to amend its rules and set up new criteria, already discussed above, to select participants.

The IAC report, therefore, further paved the way for the improvement of procedures that "breed trust" for the IPCC.<sup>536</sup> Not all recommendations, so far, have brought about actual procedural changes. The over-encompassing IAC portrait, however, stands as an exhaustive benchmark for further reforms.

### 3. Accountability structures

The coordinates of accountability allow us to delineate the operation of the IPCC through a refreshing language. In distinct ways, the IPCC is accountable to governments and scientists, both inside and outside the body. There are, thus, two enlightening angles for this recount: an *extramural* and an *intramural* and they both contain formal and informal features. The former angle refers to how the IPCC relates to the external world (either political or scientific), whereas the latter dissects the accountability structures embedded in the assessment cycle itself, with its elaborate

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<sup>533</sup> IAC, 2010, 23-24.

<sup>534</sup> Agrawala, 1998b, 628.

<sup>535</sup> IAC, 2010, 13.

<sup>536</sup> An editorial of The Economist (2010) commented upon how the IAC report illuminates some yet unfulfilled targets, which can only be met by serious reform rather than mere "codification of best practice". It contends that "(i)n many areas it lacks procedures for defining what is needed. Without these there is no agreed standard against which to judge its performance. In a contentious area where the good faith of scientists is frequently challenged, this lack of transparency and explicit procedure breeds distrust."

division of labour and multi-layered path from writing the report to the final ascription of political endorsement.

In the extramural dimension, the intergovernmental quality of the IPCC is the key to the very formal constitution of the body. Governments appoint their representatives, setting a *vertical* and *direct* principal-agent relationship with them. From this perspective, the IPCC is accountable in the *retail* (*as many*), that is, each representative is accountable to his respective appointing government. This relationship may be more or less shaped by expertise and more or less *technocratic* because, even though they make part of the political structure of the IPCC, representatives are expected to be minimally versed in climate change. As in every strict principal-agent relationship, sanctions are *hard* and may happen at *any time*, that is, the removal of the representative by her government according to an *integrity-based* assessment of their performance.

So far, the formal side of this extramural dimension was highlighted. Only from an informal point of view, however, is the IPCC held accountable in the *wholesale* (*as one*): it is supposed to be as globally representative as possible, the only way through which global credibility is believed to emerge. The loss of credibility and overall ridicule is, despite its informality, a *hard* sanction it needs to avoid. Otherwise, its soft power of persuasion cannot be exercised. In order to build its reputation, thus, the IPCC depends partly on the composition and quality of its direct participants. Geographical plurality is a standard applicable to both kinds of participants: political representatives and scientists. Secondly, reputation also hinges on the capacity of the report-making process to build trust and to prevent that individual mistakes de-moralise the institution as a whole.

Unlike political representatives, however, scientists are held to account through a more complicated process. Although countries, by preparing lists of local experts, have some role in the way scientists are appointed, there are no formal mechanisms to hold scientists accountable to governments in any meaningful sense. The obvious point is to protect the impartiality (and the image of impartiality) of the reports' authors.

First, authors may be held accountable to their own peers, again in two ways. From an extramural perspective, they are informally accountable to the scientific community at large (the epistemic community where they come from, and which establishes the standards of professional respectability and competence). Intramurally,

during the assessment cycle, they may be held accountable to expert reviewers and review editors through the review process, with all its formal requirements and burdens of justification.

Second, authors may also be held accountable to political representatives through their various interactions along the assessment cycle: at the initial review stage, to the government reviewers, and, later, to the respective plenaries that endorse their reports. The written exchange of the review process and the face-to-face plenary sessions are important intramural accountability events.<sup>537</sup> It is important to note, however, that there are absolute limits as to how far political inputs might alter, against the experts' will, the report's language and content.

The overall drafting and certifying process is shaped by reason-giving and consensual endorsements. These are qualified by a set of procedural escape-valves to accommodate dissents and record clarifications. The IPCC sets up, thus, a kind of checks and balances that moderates the friction between science and politics. Internally, this involves *bi-directional* accountability dynamics. First, from politics to science: lead authors have the *ultimate say* on what gets changed in the final text of the report. This is a way to avoid any attempt to free-ride on the legitimising effect of science, or to couch a self-interested political position in scientific terms. Second, from science to politics: authors have to publicly respond and justify, in different stages, the content of the report and, almost as importantly, its exact wording.

#### **4. Test of appropriateness: which accountability for what institutional purpose?**

After this broad depiction of the IPCC role and configuration, it is time to raise the normative question. This section is divided in two parts. First, in order to grasp the status of the IPCC in relation to the status of similar scientific bodies within global governance, I recycle a usual comparison that is made between the IPCC and the Ozone Regime. Second, I reflect upon the appropriateness of the overall accountability arrangement to meet the expected institutional purpose.

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<sup>537</sup> Agrawala has pointed out the accountability function of plenary sessions: "plenary sessions often serve as the only forum for many governments, particularly developing countries, to openly hold the IPCC accountable for whether or not it adequately considered the views sent in by their experts during peer review." (1998b, 628)

#### *4.1 An oft-made parallel with the Ozone Regime*

It has been common to draw comparisons between the Climate Change Regime and the Ozone Regime.<sup>538</sup> Both, arguably, address slightly similar problems through institutional arrangements that intend to play equivalent roles. They tackle a transnational demand that cannot be properly dealt with but by a coherent collective approach.<sup>539</sup> Both problems are the outcome of man-made activities. Both require substantial changes in industrial and individuals' behaviour. Both reinforce the disparities between north and south, or what Sunstein calls "problems of international equity":<sup>540</sup> the north that historically emitted ozone-depleting substances and greenhouse gases and, thanks to that, achieved a wide economic development, and the south which, in order to control the emission and production of such substances, requires incentives to undertake more restrictive regulation.

Moreover, the fact that the Ozone Regime, particularly the Montreal Protocol,<sup>541</sup> is perceived to be one of the most successful international environmental agreements to date, has been a reason generally invoked for this comparison.<sup>542-543</sup> Authors are constantly writing about the differences and similarities between the Montreal and the Kyoto Protocols.<sup>544</sup> They try to explain the reasons why the former achieved a greater success compared to the latter. It is a legitimate effort. By identifying the points of success of the Montreal Protocol, these authors can shed some light on the ongoing discussion about the future of an international climate change agreement.

According to Sunstein, the different fates of both Protocols can be explained by the United States' cost-benefit analysis of acceding to each Protocol: "[t]o the United States alone, prominent analyses suggested that the monetized benefits of the Kyoto Protocol would be dwarfed by the monetized costs."<sup>545</sup> In the same way, if we

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<sup>538</sup> See, for example, Agrawala, 1998b, 639.

<sup>539</sup> As I argued in chapter 1, by way of describing the idea of global common good.

<sup>540</sup> These reasons and others are better explained by Sunstein, 2007, 2-3.

<sup>541</sup> Montreal Protocol on Substances that Deplete the Ozone Layer, Sept. 16, 1987, 26 I.L.M. 1541.

<sup>542</sup> According to a recent Synthesis Report: "The Montreal Protocol is working. There is clear evidence of a decrease in the atmospheric burden of ozone-depleting substances in the lower atmosphere and in the stratosphere; some early signs of the expected stratospheric ozone recovery are also evident." (UNEP, 2007, 3)

<sup>543</sup> Barrett, 2003, 221 and Benedick, 1998, 5-8, vocally express the success of the agreement.

<sup>544</sup> Sunstein (2007), Thoms (2002-2003).

<sup>545</sup> Sunstein, 2007, 5, 30-35.

return to the list proposed by Andresen and Skjaerseth at the introduction of this chapter, it is also conceivable to claim that, between the ozone and the climate change problems, there is a large difference of degree with respect to the consensual knowledge, available technology, public opinion, and interests of political actors, which might probably have influenced the different outcomes of both Protocols.<sup>546</sup>

Most of all, a comparison is enlightening because it invites us to consider the role that science played by triggering the Montreal Protocol and still plays by boosting the success of the regime.<sup>547</sup> This role is established by article 6 of the Montreal Protocol, which creates scientific assessment panels to review the control measures agreed by the parties.<sup>548</sup>

Some background facts help to understand the historical circumstances of the Protocol. At the root of the ozone problem were industrial chemicals (Chlorofluorocarbons – CFCs), largely used in refrigerators, air-conditioners, and as propellants in aerosols spray cans.<sup>549</sup> These chemicals were triggering a strong depletion of the ozone layer.<sup>550</sup>

This initial stage opened the way for robust unilateral actions. A number of countries, notably the United States, succeeded in banning or capping the consumption and production of CFCs.<sup>551</sup> Further international measures would not be taken without the antagonism between the United States and the European Union. The former remained actively engaged in signing an international agreement and had already enacted thorough domestic policies against the proliferation of CFCs, whereas the latter emphasised the scientific uncertainties of the case.<sup>552</sup>

Somehow, the global reduction in CFCs consumption, influenced by the unilateral actions mentioned above, and the lack of striking evidences regarding the ozone depletion, led to a weak framework convention, the Vienna Convention in 1985.<sup>553</sup> The most relevant quality of the Vienna Convention was the provision that

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<sup>546</sup> Andresen and Skjaerseth, 2007, 193.

<sup>547</sup> The head of the U.S. delegation, Richard Benedick, points out more straightforwardly the significance of this responsibility of scientists: “Scientists were drawn out of their laboratories and into the negotiating process, and they had to assume an unaccustomed and occasionally uncomfortable shared responsibility for the policy implications of their findings.” (1998, 5)

<sup>548</sup> Montreal Protocol, art. 6.

<sup>549</sup> Parson, 2003, 20-21.

<sup>550</sup> In 1974, Rowland and Molina were among the first scientists to draw public attention to the fact that the release of chlorine atoms was damaging the ozone layer. (Parson, 2003, 23)

<sup>551</sup> Barrett, 2003, 223.

<sup>552</sup> Benedick, 1998, 27-37.

<sup>553</sup> Barrett, 2003, 224.

allowed UNEP to convene further international negotiations in order to achieve a legally binding control protocol.<sup>554</sup>

Apart from the Vienna Convention, 1985 was an important temporal landmark for the ozone cause: it was the year of the discovery of the Antarctica ozone hole. The commotion surrounding the hole dragged public's attention to the problem,<sup>555</sup> alongside with new scientific evidences linking ultraviolet radiation to skin cancer.<sup>556</sup>

The Montreal Protocol was signed in September 1987. Initially, it only aimed at 50% cut of five major CFCs by 1998, and a freeze on three major halons. The Montreal Protocol was subsequently amended in order to include control measures on other ozone-depleting substances, and also to tighten the control measures on the already controlled substances.<sup>557</sup> Parson argues that these adaptations over time were of key importance in the Ozone Regime success. Much of this success, in turn, can be credited to the activities developed by the scientific assessment panels.<sup>558</sup>

Unlike the IPCC, that has an intergovernmental character, the scientific body of the Ozone Regime has a subsidiary nature.<sup>559</sup> Subsidiary bodies are usually created under the shadow of a more political body, such as the conference of the parties, in order to assist it with the implementation of the overall objectives of the agreement. They are more closely attached to its creator and bounded to discharge strict obligations.<sup>560</sup>

As said above, the article 6 of the Montreal Protocol determines the creation of assessment panels in order to review the control measures adopted by the parties to the Protocol. The assessments should take place “on the basis of available scientific, environmental, technical and economic information”.<sup>561</sup> Four assessment panels were

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<sup>554</sup> Benedick, 1998, 45.

<sup>555</sup> Barrett, 2003, 225.

<sup>556</sup> Benedick, 1998, 21.

<sup>557</sup> Parson, 2003, Table 8.1, 240.

<sup>558</sup> Parson, 2003, 242. This statement is illustrated by Barret's account of the history of Montreal Protocol: “In 1989, the assessment panels set up by Montreal reported their findings. Chief among these was that, even if CFCs were phased out, the ozone layer would continue to be depleted by increased chlorine loading from carbon tetrachloride and methyl chloroform.” (2003, 234)

<sup>559</sup> There is, to be sure, a “Subsidiary Body for Scientific and Technological Advice” (SBSTA) under the Climate Change Regime. Unlike the ozone technical and scientific subsidiary body, however, the SBSTA does not have a meaningful scientific role within the Regime, as explained earlier in the chapter.

<sup>560</sup> In this sense, Bankobeza, 2005, 139-142.

<sup>561</sup> Montreal Protocol, art. 6.

created at the first Meeting of the Parties and, collectively, they are the subsidiary body entitled to provide scientific and technological advice.<sup>562</sup>

Together with the assessment panels, an open-ended working group was created and assigned with two crucial tasks: the revision of the reports of the four panels and the subsequent preparation of a SYR; secondly, the preparation of draft proposals for any amendments to the Protocol.<sup>563</sup>

The workload of each assessment panel is defined by “terms of reference”. The terms of reference are the product of the meeting of parties and may change from time to time in accordance with the parties’ needs.<sup>564</sup> These assessment panels have an advisory function and hence do not evaluate policy issues nor do they recommend any policy. This is a less intrusive role than the one played by the IPCC, however cautious the policy recommendations of the latter might be.<sup>565</sup>

Instead of a comprehensive set of rules on matters relating to how the assessment works take place, the “Terms of Reference for the Panels” of the first Meeting of the Parties give an overarching view of the dynamics of this subsidiary body.<sup>566</sup> Similarly to the IPCC, the experts that form the assessment panels must serve on their individual capacity irrespective of the origin of their nomination. They have to be “internationally recognized” and shall come from “the widest possible geographical balance of representation”. There is an internal division of functions among each panel. Executive summaries “written in a style understandable and useful to policy makers” should precede each technical report. Once ready, the three reports should be consolidated by the “Integration Working Group”.

The Technology and Economic Assessment Panel (TEAP) deserved a specific and more detailed version of its Terms of Reference.<sup>567</sup> The procedure followed by

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<sup>562</sup> The four panels are: Scientific, Environmental, Technical and Economic (UNEP, 1989, Decisions, paragraph 3). See also Bankobeza, 2005, 143. Later, the Technical and Economic Panels merged into one, called the Technology and Economic Assessment Panel (TEAP). It appears in the Report of the 3rd Meeting of the Parties to the Montreal Protocol. (UNEP, 1991)

<sup>563</sup> UNEP, 1989, Decisions, paragraph 5.

<sup>564</sup> UNEP, 1996, Annex V, Scope of Work.

<sup>565</sup> UNEP, 1996, Annex V, Scope of Work.

<sup>566</sup> UNEP, 1989, Annex VI.

<sup>567</sup> UNEP, 1996, Annex V, Code of Conduct (5). TEAP is formed by six Technical Options Committees and, should the case require, can be joined by other Temporary Subsidiary Technical Bodies. All members of TEAP are expected to follow a rigid Code of Conduct, which dictates how members should handle eventual conflicts arising from their private and public capacities. Of great importance to enhance the transparency and credibility of the work carried out by panel members is the “disclosure of interest declarations”, according to which “members shall disclose activities including



the TEAP reports embodies some similar, however less intricate, patterns than those of the IPCC procedures. TEAP reports follow the basic rule of consensus. In case there are differing opinions among members, the Terms of Reference laconically mention: “reports must reflect any minority views appropriately”. The whole procedure has a pitch of secrecy: observers do not have access to TEAP meetings and its materials and drafts are not available to the public. Still, members of the public are encouraged to make commentaries regarding the final report.<sup>568</sup>

As for the peer-review, the touchstone of IPCC procedures, it seems to be a practice followed by each report, despite the lack of written provisions about it. The 1998 Synthesis Report outlines the different peer-review methods applied by each panel.<sup>569</sup> The report of the Scientific Panel undergoes a first mail peer-review, with several reviewers per chapter. The draft report goes through a weeklong panel review, which will be in charge of preparing the conclusions of each chapter of the report. Within the Environmental Panel, the first round of peer-review is internal: the chapter’s authors review each other’s chapters. The draft is then sent to external scientific reviewers.

The TEAP is the closest to, and yet very distant from, the complex peer-review followed by the IPCC. In such a panel, three standing committees prepare the reports.<sup>570</sup> These reports are reviewed internally and by the broader technical communities.

This quick description helps highlight how the process of the IPCC can be regarded as a more mature version for the pursuit of a reasonably similar institutional task. The most evident difference between them is not exactly related to their content, but to the degree of development and thoroughness achieved by the IPCC procedures in relation to those employed by the scientific body under the Montreal Protocol. In this sense, both procedures indicate the need to have a geographically balanced group of independent experts, and to assess the latest scientific knowledge about the problem at hand. Both of them require that assessment reports undergo a review. Both procedures even indicate the need to acknowledge differing views in their assessment reports.

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business or financial interest in production of ozone-depleting substances (...) which might call into question their ability to discharge their duties and responsibilities objectively”.

<sup>568</sup> UNEP, 1996, Annex V, Report of TEP/TOC/TSBs (4).

<sup>569</sup> UNEP, 1999, Preface, vii-viii.

<sup>570</sup> The committees are: Industries, Government, and Academic experts.

In any case, one cannot refrain from looking for the reasons why the IPCC procedures went the extra mile to provide a more intricate and refined approach to the endorsement of its reports. The role of review editors, the diversifying of the possible sources of information between non-peer and peer-reviewed literature, the laborious line-by-line approval of the summary for policymakers, and the explicit guidance on how to address uncertainties probably tell us something significant about the more taxing and controversial institutional role of the IPCC. One could validly say that the difference lies in the intergovernmental nature of the IPCC in comparison to the subsidiary nature of the scientific body of the Montreal Protocol. An intergovernmental nature requires a more intense participation from government representatives and, thus, more complex organizational rules. It might be the case that the IPCC procedures are simply the outcome of a more reflective learning on how assessment reports of complex international environmental problems should be conducted by international bodies. Agrawala mentions a third possible answer that would explain the difference: the more vexed political nature of the climate change problem in comparison with the ozone problem.<sup>571</sup>

The Himalayan glaciers episode provides intriguing insights into an additional answer. Roughly, what the IPCC declared about the episode is that a mistake only happened because its procedures were not rigorously followed. If the experts who were involved in assessing the data regarding the Himalayan glaciers had followed the IPCC guidance, the outcome would probably have been different.<sup>572</sup> Likewise, the Climategate affair triggered two consecutive statements from the IPCC that go in the same direction.<sup>573</sup> According to such statements, the strength of IPCC and, thus, of its assessment reports come from its principles and procedures, which place emphasis on four crucial elements: balanced representation of experts; comprehensive treatment of the scientific literature; broad and independent two-layers of review; and the line-by-line approval of the summary for policymakers.<sup>574</sup>

These statements may not explain the reasons involved in the creation of a much more detailed procedure, but they reveal the high expectations attached to release of each report. The line of thought is simple: the distinctive features of the

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<sup>571</sup> Agrawala, 1998b, 639.

<sup>572</sup> IPCC (2010).

<sup>573</sup> IPCC (2010b) and IPCC (2010c).

<sup>574</sup> IPCC, 2010b, 1.

IPCC procedures are essential for producing good assessment reports, what the IPCC calls “the international gold standard in the scientific assessment of climate change”.<sup>575</sup> Accordingly, it is expected that mistaken assessments will be minimised should the procedures be rigorously observed. IAC’s revision of the procedures and processes buttresses this expectation.

Within the Climate Change Regime, the IPCC has a daunting task, which is to provide policymakers with scientific knowledge about climate change. It develops such task in an incendiary political setting among government representatives and the scientific community. In order to maintain scientific rigour and also to promote participation of government representatives in the assessment reports, detailed procedures, which give particular importance to transparency, openness, peer-review, and geographical balance of experts were crafted. Such elements are expected to stand up for the IPCC in the light of permanent challenges and to place IPCC assessment reports as valuable and authoritative sources of advice.

#### ***4.2 Engendering the encounter between (world) science and (global) politics***

How does the interaction between science and politics, in the context of a body like the IPCC, matter for accountability? Articulating the right terms for such relationship is the initial step towards conceiving an institutional configuration that is appropriate for a body of this sort. This is the fine line of IPCC’s overall design.

Metaphors could be tried out to capture the institutional mission of the IPCC. It can perhaps be insightfully seen as a *cushion* that keeps the independence of science while translating their findings to policymakers, or, as Skodvin suggested, as “institutional *buffers*”<sup>576</sup> between the two. These binary metaphors, however, do not work quite well. The IPCC is not exactly a *wall* or a *shield* that sever two spaces. A more gradualist metaphor would be more apt to describe the process. The IPCC can perhaps be considered a *transitional space* or a *channel* between the ivory tower, the public square and the top-level decision-making tables. Or, as Skodvin alternatively proposed, a “*zone* rather than a *clear-cut border*”.<sup>577</sup>

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<sup>575</sup> IPCC, 2010b, 1.

<sup>576</sup> Skodvin, 1999, 28.

<sup>577</sup> Skodvin, 1999, 17.

Whichever the best image might be, the IPCC's institutional point is both to protect and to probe science, to insulate and to check the process of scientific production. In its original context, science is concerned with discovering and explaining facts and causal relations. From an optimistic viewpoint it can be described as a disinterested truth-seeking endeavour, undertaken in a de-politicised institutional setting. Politics, in turn, is a sphere in charge of generating collective decisions. As phrased by Skodvin, they are two discrete "systems of behaviour": "science is everything that politics is not: pure, objective, subject to rational analytical reasoning and thus not hostage to manipulation tactics and coercive power".<sup>578</sup>

This image, however inaccurate it might be, shapes the perception of the public about the role of the IPCC. The 'science for policy' enterprise merges those two systems. It somewhat instrumentalises science for the sake of political problem-solving, and, thus, mutates its original context significantly. The institutional designer, thus, faces a demanding task: it must both keep them separate from each other and merge them with one another. In doing so, it should also represent or reflect the conflicts that internally pervade the scientific field.<sup>579</sup>

The three-tiered process of the IPCC – from the *scientific core* (the writing teams, reviewers and editors) to the *politicised plenaries* (WGs plenaries and Panel) – nurtures that aim. It softens the encounter between science and sheer self-interested politics and facilitates conversation. It avoids direct political interference without, at the same time, cloistering scientific conclusions against critical public scrutiny. Rather than a mere compilation and translation, which even competent scientific journalists could arguably do, the hybrid institutional structure entails an active, yet mediated, engagement. This institutional set-up strikes a balance between, on the one hand, the autonomy of science and, on the other, the "adversarial scrutiny" with politicians. The process "invites and depends" upon the interaction between both fields.<sup>580</sup> Such design is allegedly more apt than the experimented alternatives to achieve that taxing end.<sup>581</sup>

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<sup>578</sup> Skodvin, 1999, 4.

<sup>579</sup> As Skodvin contends: "processes of science-policy interaction are most likely to succeed if they are organised within institutions capable of both separating and integrating science and politics" (1999, 11) Note that she has previously acknowledged that "(v)ery few pieces of (core) knowledge are readily available for policy-maker to 'apply'." (1999, 10)

<sup>580</sup> Skodvin, 2000, 409

<sup>581</sup> See Agrawala (1998a). Bolin (1995) also defends the virtues of this mixed structure: "Of course no single scientist can be completely objective, particularly about as complex an issue as that of human-

This architectural ingenuity of the IPCC, however, is also its Achilles' heel: its outputs remain under permanent threat of politicisation. Such vulnerability can only be avoided, on the one hand, by the quality and reliability of the process, and, on the other, by the leadership and respectfulness of the scientists involved. Institutional experiments that preceded the IPCC have proved that this desired level of respect could hardly accrue were this body completely isolated from the political milieu.<sup>582</sup>

Unlike a governmental think tank or its congeners, the IPCC does not do research or produce knowledge. Unlike regulatory bodies, it does not make normative choices properly so called or exercise any sort of coercive power. What it does is to grant a comprehensive body of scientific knowledge a political status, a rather unique sort, if at all, of political agency. Credibility is not obtained through an unbridled vote of confidence or blind deference towards scientists and expertise, but rather by bringing policymakers together into the process. The interaction is a device for trust-building.<sup>583</sup> However banal that might sound, after all any institution ultimately needs a measure of trust, for the IPCC this is primordial.

Harnessing *trust* depends very much on following a process that is beyond suspicion, that is, a process that inspires *trustworthiness*.<sup>584</sup> The IPCC, however, is set within an inflammable political context. Some of the largest global economic interests are financially harmed by the reduction of GHGs emissions. These mighty adversaries have tangible incentives to doubt and distort any scientific evidence that recommends such a policy. What's more, there are abundant conspiratorial theories about what intimately drives climate scientists to assure that climate change is a veritable and

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induced climate change, but the collective work led by IPCC is generally much more reliable than other attempts to summarise scientific research results for the political process." Bolin and Houghton (1995) further elaborate on that: "The IPCC process has two main strengths. First, in its assessments it has succeeded in involving a very large proportion of active scientists (many of them world leaders) working in the field over a wide range of countries. IPCC reports have therefore achieved a large degree of ownership by the worldwide scientific community. In a field as complex and controversial as global warming, assessments by smaller groups of scientists would not carry the same degree of acceptance. Second, because the IPCC is intergovernmental and involves government scientists in its approval process, it has also been recognised as their prime source of information. This is absolutely essential. To move the policy debate forward requires the broad acceptance by governments of the uncurling science. Any body chosen to advise the UN Framework Convention on Climate Change must ensure that these two strengths are maintained."

<sup>582</sup> For Agrawala, the greatest contribution of the IPCC "has not been at the level of aiding spectacular decisions but rather at the level of low-key process interactions with its users." (1998b, 639)

<sup>583</sup> Vasileiadou et al, 2011, 1060; O'Neill (2007).

<sup>584</sup> See O'Neill, 2007, 166.

dangerous phenomenon.<sup>585</sup> Accusations of manipulation have constantly been creeping through the back door. And plainly enough, this renders the process suspicious.

The only safeguard against climate-denialists is the way the process is designed and actually put into practice. However accurate the IPCC reports are with regards to the scientific conclusions, watchful denialists will keep an eye on every minute failure, technical or linguistic.<sup>586</sup> In such a context, the need to furnish arenas of dialogue and to insulate dialogue against campaigns that strive to taint the consistency and authority of the reports, is paramount. The process of the IPCC, however fallible any process might be, has to withstand such incessant tribulations. After the Climategate episode, the scientific and political communities have not withdrawn their confidence on the conclusions of the IPCC reports. However, as Skodvin and Andresen pointed out, “the way the process is organised does not live up to requirements for transparency and accountability.”<sup>587</sup>

A test of appropriateness, as explained by chapter 2, seeks to contrast the existing accountability arrangement with the normative lenses of GAL. The central function of the IPCC, again, is to deliver an assessment report that imbues a group of scientists and policymakers with a *sense of co-authorship*. This group, in addition, needs to be qualified by geopolitical representativeness.<sup>588</sup> *Globally representative co-authorship* is a matter of persuasion: to convince and sensitise policymakers inside and outside the body about the seriousness of the phenomenon, overcome occasional reluctances and trigger political action. Scientific stature, moral standing and political reliability are the chief accountability currencies in play.

IPCC’s decisions, therefore, are not commands. The IPCC cannot enforce its policy recommendations and there is no coercive power at stake. In fact, it has

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<sup>585</sup> Schellnhuber, for example, informs us about how the “global warming denial machine” may even threaten the lives of climate scientists. (Omid, 2012)

<sup>586</sup> In the light of criticisms, supporters of the IPCC assessment work claimed that: “having failed to win the scientific debate, critics are now using the procedural error to discredit the whole IPCC process.” (Dickson, 1994, 467)

<sup>587</sup> Skodvin and Andresen, 2011, 172.

<sup>588</sup> Skodvin has actually elaborated on the functions of the IPCC in a slightly broader way. For her, apart from providing (i) reports that have (ii) representativity, it is important to think about the functions of (iii) “interpreting” the reports, executed by the WGs, and (iv) “conflict resolution” fulfilled by the Chair’s informal leadership and strategy for consensus-building. (1999, 25-26) On leadership, she contends that: “(t)he leadership provided by individual actors is, in a sense, the ‘glue’ of the system.” (1999, 31)

deliberately tried to avoid “getting its hands dirty”.<sup>589</sup> Neither a tension between empowerment and disempowerment, nor a danger of human rights’ violation is directly implicated in the IPCC’s activities (even if that conclusion might not be true with regards to other components of the Climate Change Regime). Therefore, the global constitutionalist framework (GCon), as conceived by chapter 2, would be little telling with regards to the IPCC.

IPCC’s self-perception, however, as revealed by its public statements and constant procedural reforms, is very much in tune with GAL’s scholarly suggestions and institutional comparisons. To the extent that GAL’s suggested devices are adaptable to an institution with the particular task of the IPCC, they are already in place. Because the standard model of scientific accountability and self-regulation – review by peers – does not suffice, the procedures of the IPCC are permeated by complementary administrative law-like principles that shape its collective writing process. The question as to whether these principles are enshrined to a sufficient degree or modulated in the right way remains to be answered.

Each of GAL’s principles manifests itself in a quite clear way along the process. ‘Transparency’ is present in two ways: accessibility-transparency (the prompt availability of norms, documents and outputs) and content-transparency (the linguistic candour and precision recommended by the guidelines for communicating uncertainty). The two-stage review process, mediated by review editors, allows for inputs from outsiders and corrections by writing teams. This process fulfils, at the same time, the principle of ‘review’ and of ‘participation’. Each correction, or refusal to correct, is expected to be clearly justified, an important demand of ‘reason-giving’. The plenaries at the WGs and the Panel, in turn, furnish some degree of interest-representation (which will vary, for sure, depending on how much geopolitical representativity the IPCC enjoys).

There is, hence, an accountability package that somehow translates and significantly instantiates each of GAL’s principles. Furthermore, the diachronic description of the procedural evolvement shows that the IPCC has increasingly become more accountable. From the standpoint of GAL, at least, this is certainly so.

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<sup>589</sup> Agrawala points to the ambivalent nature of this strategy: “It studiously stays clear from policy recommendations. It even avoids shaping the priorities of global change research programs to avoid unnecessary politicisation of its assessment process. Many argue that this sanitized approach and IPCC’s reluctance to ‘get its hands dirty’ may have made it less useful than it could have been.” (1998b, 638)

The credibility of the IPCC derives from its process, which constitutes, as we have already seen, a highly refined structure of accountability. It needs to tackle, above all, three kinds of risks: (i) under-inclusiveness, (ii) misreporting science and (iii) not convincing people that the reports are trustworthy. These risks can only be prevented, to invoke the functions of accountability devised in chapter 1, by respectively reinforcing the democratic, epistemic and populist functions of accountability.

Two features of the IPCC structure address these concerns: its intergovernmental quality – the “famous I”<sup>590</sup> – and a participatory and representative process that promotes a sense of “ownership by the worldwide scientific community”.<sup>591</sup>

The optimal measure of these principles is impossible to grasp through a precise abstract rule. As it happens with institutional design, it inevitably remains an open question. The level of complexity of the process, for example, which leads to a time-consuming assessment cycle, might become dysfunctional at some point.<sup>592</sup> Certain observers and participants now question whether a step back would be desirable. At some points of the cycle, the IPCC might have reached accountability overburden. Simplifying that intricate process, however, runs the risk of compromising the democratic, epistemic and populist functions.<sup>593</sup> With regards to the timing of each cycle, there is also a delicate trade-off between duration of the assessment cycle and the policy-relevance that it ultimately gains.<sup>594</sup>

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<sup>590</sup> The intergovernmental character helps, according to Agrawala, “educating many government bureaucrats”. (1998a, 611) It also carries, as Skodvin and Andresen remind, an inevitable “vulnerability to politicisation”. (2011, 172)

<sup>591</sup> Bolin and Houghton (1995)

<sup>592</sup> Skodvin called attention to the review process: “the time spent on the collection and incorporation of review comments exceeds the time spent on actually writing the reports, and there are limits as to how much more of this kind of non-productive time-consuming procedures the IPCC process can bear.” (2000, 411)

<sup>593</sup> Skodvin and Andresen (2011)

<sup>594</sup> The problem of low speed and the intricacy of the procedures, Agrawala notes, sometimes make the IPCC suffer from the “Frankenstein Syndrome”: it sparked the whole negotiation process that led to the creation of the FCCC, but sometimes cannot timely deliver what the FCCC demands. (1998b, 636) The diversification of “assessment outputs”, which opened the possibility for more rapid and less comprehensive statements, like the “Technical Papers”, was an attempt of the IPCC to cope with that.



## 5. Conclusion

The power of the IPCC is based upon the credibility of its voice. Whenever the public withdraws this pedigree, its capacity to influence and persuade shrinks. Hence, its institutional *raison d'être* evaporates. Dispelling distrust and preventing bias is the only way to succeed. The weight of the official statement that each of its reports embodies is entirely contingent upon its iterative process.

The IPCC does neither solve conflicts nor mediate disputes, it does neither generate nor apply law, however law is conceived. It lodges, through a meticulous process, a periodical political stamp to the up-to-date scientific knowledge on climate change. It double-checks scientific consistency and ponders on what to do with regards to the discoveries. It tries to reach an agreed factual point of departure from which further political debate on what to do will go on. It seeks to grasp, first, whether and how climate change is happening, or what we know about it. Second, it estimates what differences climate change makes in our lives and what can collectively be done to counter it (that is, both to adapt and to mitigate).

It is fair to ask why a political body is needed to attest or confirm what science has already discovered. The IPCC is usually referred to as a “scientific body”. This qualification might be misleading. Irrespective of whether that name is appropriate or not, it certainly does not intend to portray a body that practices or generates science, as a laboratory or a research institute, but rather as a body with a set of interrelated public responsibilities. These include certifying the scientific findings already out there, acknowledging their validity, systematising and digesting their monumental complexity, contextualising and deriving implications for concrete collective action. Remarkably, the IPCC strives to merge two communities and make them speak with a single voice, a single composite “we”: “we the scientists and political representatives”, “we the experts and the lay public”.

Pachauri’s closing interrogation of his Nobel Peace Prize speech captures the heart of IPCC institutional challenge: “Will those responsible for decisions in the field of climate change at the global level listen to the voice of science and knowledge,

which is now loud and clear?”<sup>595</sup> The opening epigraph also reflects the same idea: “The science of the situation is clear – it’s time for the politics to follow.”<sup>596</sup>

I do not know how clear the “science of the situation” actually is, although we can confidently assert that it has been loud for some years. This thesis obviously does not address a question that only climate scientists are able to answer. Pachauri and Hanse, however, sharply capture the challenge of the IPCC: the need for science to persuade politicians on what the stakes are, and how high they can reach. The issue is too serious to be left exclusively in the hands of either scientists or politicians: it is too complex and technical to leave to the former; it demands efficacious collective decisions, aggravated by uncertainty and thorny value judgments, that can’t be left to the latter alone. In other words, scientists cannot and should not pay lip service to politicians and vice versa.

Efforts to discredit the ‘inconvenient truths’ of science are not new. Potent interest groups are usually against scientific findings. To name popular examples, the policymaking consensus over the effects of tobacco and second-hand smoke on health, or the question about what drives acid rains and ozone depletion, emerged after long-lasting and hard-fought public contestation. The IPCC, in its particular field, provides a forum for that contestation. It has to neutralise the strategy “if you don’t like the message, discredit the messenger”.<sup>597</sup> It needs to give climate-sceptics due consideration and to outclass them in the credibility contest.

There is no way out of this conundrum except through a rigorous process of mutual engagement and accountability between the inputs – a multifaceted scientific literature – and the final output – the “mammoth” assessment reports.<sup>598</sup> This is, at least, the assumption that underlies the IPCC structure and overall endeavour. Despite the convulsions after each credibility crisis, it currently has an “unrivalled hegemony” in climate assessment. That was not and could not be spontaneously inbuilt into its identity. It was rather an accomplishment.<sup>599</sup>

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<sup>595</sup> Pachauri (2007)

<sup>596</sup> Hanse (2012).

<sup>597</sup> Agrawala, 1998b, 625.

<sup>598</sup> As an editorial of *The Economist* has called it: the “mammoth assessments of climate science”. (2010, 78-79)

<sup>599</sup> Agrawala, 1998b, 640.

## Chapter 5

### **The Compliance Committee of the Kyoto Protocol (CCKP): holding enforcement to account or ‘who guards the guardian?’**

#### **1. Introduction**

Compliance procedures have become an indispensable element for the reliability and effectiveness of multilateral environmental agreements. Such procedures seek to induce independent nation-states to comply with their international obligations and, thus, check whether and how each country is implementing its share of the agreed commitments. ‘Inducement’ very much synthesises the legal philosophy that informs the concept of this allegedly ‘soft’ kind of authority. An arrangement of this kind presupposes, therefore, a fine comprehension of, or plausible empirical conjectures about, the behavioural determinants of international actors. Fomenting congruent collective behaviour is its evident aspiration.

The first non-compliance procedure was established by the 1987 Montreal Protocol to the 1985 Vienna Convention on the Protection of the Ozone Layer. This is the original experience to have inspired others that followed, like the Kyoto Protocol itself. Authors usually applaud the innovation that was brought by *non-compliance procedures* as an ingenious alternative to the traditional *dispute settlement procedures*, both of which may exist alongside each other. After all, non-compliance procedures are perceived as minor or as less invading threats to state-sovereignty. The main goal of this specific machinery is not exactly to sanction the defaulting state-party, but rather to help it return to the path of compliance.<sup>600</sup>

The compliance system under the Kyoto Protocol, which is working since 2006, aims at facilitating, promoting and enforcing compliance with the commitments

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<sup>600</sup> Handl defines non-compliance procedures as “forward rather than backward looking”. (1997, 34) Handl claims that non-compliance procedures are crafted to deal with collective problems that involve a great number of parties, whereas dispute settlement procedures are characterised for its bilateralism (injured v. injuring state). (1997, 35) This opinion is also shared by Fitzmaurice and Redgwell: “The distinctive character of certain multilateral environmental treaty obligations arises from a number of factors: the pace, magnitude and irreversibility of environmental problems which renders enforcement inter partes ineffective; the failure to operationalise traditional rules on state liability and responsibility”. (2000, 41)

that were established by the Protocol.<sup>601</sup> This specific compliance mechanism is believed to be of a peculiar type. Oftentimes, compliance procedures are praised for emphasising facilitative and non-confrontational solutions towards compliance. The compliance system under the Kyoto Protocol, however, has turned the spotlight on slightly thicker enforcement measures: for the first time, an independent body might declare a party *to be in non-compliance* with its commitments. Thus, sanctions or, in the euphemistic jargon of the non-compliance procedure, certain “consequences” should follow in order to enhance compliance rates.<sup>602</sup>

Promising though as this system might seem, it has recently faced a moment of uncertainty and anxiety as to its prospects. As one of the most important commitments of the Kyoto Protocol – the binding emissions targets assigned to developed countries<sup>603</sup> – expired at the end of 2012, there have been tough negotiations with respect to the next round of commitments. The Kyoto Protocol, as already mentioned in chapter 3, was finally extended to a second commitment period, from 2013 to 2020. That anxiety was due to the fact that, even in the absence of a commitment period, the compliance system has been praised as a pivotal building block of the Climate Change Regime.<sup>604</sup> In parallel to the Kyoto Protocol, the parties

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<sup>601</sup> The compliance system of the Kyoto Protocol is shaped by three main sources: (i) Kyoto Protocol, art. 18: “The Conference of the Parties serving as the meeting of the Parties to this Protocol shall, at its first session, approve appropriate and effective procedures and mechanisms to determine and to address cases of non-compliance with the provisions of this Protocol, including through the development of an indicative list of consequences, taking into account the cause, type, degree and frequency of non-compliance. Any procedures and mechanisms under this Article entailing binding consequences shall be adopted by means of an amendment to this Protocol”. (ii) Decision 27/CMP.1, which corresponds to the Procedures and mechanisms relating to compliance under the Kyoto Protocol (Non-Compliance Procedure), and (iii) Decisions 4/CMP.2 and 4/CMP.4, which are the Rules of Procedure. The FCCC has a similar compliance procedure – the Multilateral Consultative Process, which is described in art. 13. Such procedure, however, was never implemented due to the fact that the Kyoto Protocol was being negotiated in parallel. (Werksman and Herbertson, 2010, 127)

<sup>602</sup> Werksman analyses the negotiations of the compliance system of the Kyoto Protocol and reports the ultimate preference towards harder enforcement measures. (Werksman, 2005) To Mitchell, however, the regime should be more about facilitating compliance than about deterring non-compliance. He says: “The regime’s response to non-compliance with targets appear somewhat harsher on paper but, like most sanctions in environmental agreements, seem unlikely to be used for several reasons”. (2005, 75) Mitchell goes on to contend that facilitating compliance instead of sanctioning non-compliance may be a better instrument to alter the beliefs of society and states. They would internalise as legitimate any actions that protects the climate: “The very ease of complying makes it more difficult for a country to sustain an argument that not complying is appropriate: if compliance is easy for the country complying but non-compliance is expensive to the environment and other countries, then non-compliance is likely to be increasingly viewed as deserving social opprobrium.” (2005, 65)

<sup>603</sup> Kyoto Protocol, art. 3, paragraph 1.

<sup>604</sup> The paper provided by the Ad Hoc Working Group on Further Commitments for Annex I Parties under the Kyoto Protocol concluded that the compliance system should exist even if there is no commitment period: “The operation of the procedures and mechanisms relating to compliance adopted under Article 18 of the Kyoto Protocol and contained in the annex to decision 27/CMP.1 is not

committed to putting forward, until 2015, “a protocol, another legal instrument or an agreed outcome with legal force under the Convention applicable to all Parties”.<sup>605</sup> The expectation, therefore, is that an occasional new instrument will preserve the general design features of the current compliance system.

The compliance system is, at its core, an accountability mechanism. Despite not being usually referred to in these terms, it intends to turn the parties to the Kyoto Protocol accountable (or compliant, in this case). The Compliance Committee of the Kyoto Protocol (CCKP), therefore, is an account-holder of the countries that have acceded to Kyoto Protocol’s obligations. This perspective, nonetheless, illuminates just a part of the accountability story that moulds this compliance system. If the CCKP is a sort of ‘guardian’ of this international regime, one may still ask the ‘old chestnut’ about political authority: who guards the guardian? Who holds the accountant to account?

This chapter is concerned with how accountable this very mechanism is. It examines, so to say, the ‘accountability of the accountability’. The CCKP, indeed, is an instrument for holding states to account.<sup>606</sup> This ‘first-order accountability’, however relevant, will not be the dominant angle of this study. Instead, it is the less examined ‘second-order accountability’ dimension of the CCKP that will be carefully considered. Chapter 2 has already furnished the main arguments to answer why this is neither a trivial nor an epiphenomenal dimension.

The chapter is divided into three sections, generally replicating the structure and logic of the previous chapter. The first section delineates the institutional configuration of such compliance system. It comprises the purpose that any institutional strategy towards compliance intends to fulfil, its main actors, the process and the guarantees ascribed to any party with compliance issues. This section also recalls a few examples of what the system has so far delivered. The second section explores the accountability structures that surround the CCKP. The third section engages with a preliminary assessment of the appropriateness of these structures vis-à-vis the overall institutional mission that is embedded in the compliance procedure.

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conditional on the existence of a commitment period.” (Legal considerations relating to a possible gap between the first and subsequent commitment periods, 2010, paragraph 52)

<sup>605</sup> Draft Decision CP/18, Advancing the Durban Platform, paragraph 4.

<sup>606</sup> This is the question that has more often worried international lawyers. See Boyle (1991 and 1993)

## 2. Institutional configuration

### 2.1 Purpose

Why states decide to comply with their international commitments and how compliance should be instigated are intriguing and debatable explanatory issues. In order to have a clearer picture of the question, this section follows two steps. The first entertains the inquiry about, according to the literature, the motivations behind a states' decision to comply with its international obligations. This step pays attention to the dispute between two schools of legal thought with regards to the available methods to ensure adequate levels of compliance in multilateral treaty regimes. Eventually, this dispute has shaped the format of various compliance systems, including the design of the compliance system under the Kyoto Protocol. The second step explains the nature of the commitments under the Kyoto Protocol and its chosen compliance mechanism.

The answer to the question about the roots of compliance in international law can be quite contentious. Burgstaller describes the state-of-the-art in the field. He classifies the vast body of scholarship thereupon into three general theories.<sup>607</sup> The first and most accepted theory maintains that states follow international law whenever it is in their interest to do so. As self-interested actors, their behaviour and interactions with other states would be the outcome of prior cost-benefit analysis.<sup>608</sup> This is the self-styled “realist” take on the matter.

The second strand is labelled “institutionalist”. Supporters of such theory consider that international institutions are capable of influencing and incentivising compliance in international law. According to its general slogan, “institutions matter”. Centralised monitoring and the reduction of information asymmetry are some of the tools available to international institutions.<sup>609</sup> Most importantly, these institutions

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<sup>607</sup> Kingsbury reminds that each theory has its own view on the determinants of state behaviour and, ultimately, on how compliance is obtained. (1997-1998, 368)

<sup>608</sup> Burgstaller, 2005, 97-99.

<sup>609</sup> Kingsbury enumerates some of the benefits the institutionalist approach seems to bring to international cooperation: “Rules and institutions help stabilize expectations, reduce transaction costs of bargaining, raise the price of defection by lengthening the shadow of the future, increase the availability of information, provide or facilitate monitoring, settle disputes, increase audience costs of

would influence the behaviour of states because their processes of “authoritative decision-making” generate legitimate rules.<sup>610</sup>

The third theory emphasises the norm as the main element pushing states to comply with their international obligations. States would follow international law out of their “sense of moral and ethical obligation derived from considerations of natural law and justice”.<sup>611</sup>

Accordingly, concrete answers to these questions end up selectively borrowing from the premises and recommendations of all these theories. This means that some sort of combination between self-interest, institutional ingenuity and the quality of norms or processes is believed to drive or bear an impact upon compliance with international law.

Different models, therefore, spring from such combinations. The contrast between the “managerial model”, thoroughly elaborated by Abram and Antonia Chayes,<sup>612</sup> and the “enforcement model”, defended by Downs et al.,<sup>613</sup> has resonated across treaty regimes in general. The Climate Change Regime, in particular, is no exception. Such debate takes place mostly within the confines of the institutionalist theory and highlights the challenges of institutional design in the light of the problem it intends to manage.<sup>614</sup>

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commitments, connect performance across different issues, and increase reputational costs and benefits related to conformity of behavior with rules.” (1997-1998, 352)

<sup>610</sup> Burgstaller, 2005, 99-101.

<sup>611</sup> Burgstaller, 2005, 101. Thomas Franck is one of the exponents of such theory. His main question is: “Why do powerful nations obey powerless rules?” And his answer: “Because they perceive the rule and its institutional penumbra to have a high degree of legitimacy”. For Franck, this degree of legitimacy is essential to “exert a powerful pull toward compliance”. In his view, the degree of legitimacy of a rule, and, consequently, its ability to pull towards compliance, is measured in accordance with four variables: determinacy, symbolic validation, coherence, and adherence. (1990, 3 and 25) Jutta Brunnée is another supporter of this theory. She explains the adherence to international law through an interactional account, which is based on substantive and procedural grounds. As for the substantive character, lawmaking should be sensitive to the internal quality of norms (transparency, predictability, and ability to guide the discretion of officials). Procedurally, all relevant actors should be allowed to participate in the establishment of these norms. (Brunnée, 2003, 261-262)

<sup>612</sup> Chayes and Chayes (1995)

<sup>613</sup> Downs et al (1996)

<sup>614</sup> There is disagreement about whether such debate really pertains to the institutionalist theory. Brunnée clarifies that both authors, the Chayeses and Downs et al., ultimately rely on self-interest to explain compliance with international obligations. For the enforcement group, for example, states are rational actors that work according to incentives and disincentives. As for the Chayeses, despite their theory about the importance of management and persuasion within treaty regimes, the basic argument is that states follow international law in order to be part of the international community. (Brunnée, 2003, 260)

The working assumption of the Chayeses is that states have a primary tendency to comply.<sup>615</sup> Such tendency is the normal behaviour after a treaty is formally accepted. As consensual instruments, the Chayeses continue, treaties are indicative of the interests of states and, therefore, the agreed rules are the usual guidance for their conduct. They reject the realists' main belief – that states do only comply with their commitments after a crude calculation of costs and benefits – and argue that violations are frequently the result of three elements: first, the ambiguity of the treaty language; second, the limited capacity of the parties to comply; and third, the change of the states' situation between the moment an agreement is signed and the consecutive moment the parties start implementing its terms.<sup>616</sup>

According to the authors, at the root of the compliance problem are factors impairing the capacity of states to fulfil their commitments. It is not a matter of states deliberately disobeying their obligations, but rather of states being unable to observe them.<sup>617</sup> Because of this fact, the Chayeses maintain that sanctions are useless policy tools to influence deviant states to comply. In a widely quoted passage, they claim: “sanctioning authority is rarely granted by treaty, rarely used when granted, and likely to be ineffective when used”.<sup>618</sup>

Instead of enforcement techniques, the Chayeses believe in a “management strategy” to deal with compliance demands. According to this strategy, the situation that leads to non-compliance should be exposed, collectively analysed, and, if necessary, tackled by adapting the treaty requirements to the specificities of the concrete situation. When it comes to compliance, the keyword for the Chayeses is ‘persuasion’,<sup>619</sup> which means leading a “verbal, interactive, and consensual” process with the potential wrongdoer.<sup>620</sup>

Concretely, such management strategy requires *transparency*, which is obtained through self-reports that account for how the party has been implementing its commitments. As the authors explain, transparency is a crucial engine to facilitate

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<sup>615</sup> Chayes and Chayes, 1995, 3.

<sup>616</sup> Chayes and Chayes, 1995, 4-10.

<sup>617</sup> Chayes and Chayes, 1995, 9-10. A detailed account of these circumstances can be seen at 10-17.

<sup>618</sup> Chayes and Chayes, 1995, 32-33.

<sup>619</sup> Chayes and Chayes, 1995, 24-25.

<sup>620</sup> In the complete passage: “For the most part, compliance strategies seek to remove obstacles, clarify issues, and convince parties to change their behavior. The dominant approach is cooperative rather than adversarial. Instances of apparent non-compliance are treated as problems to be solved, rather than as wrongs to be punished. In general, the method is verbal, interactive, and consensual”. (Chayes and Chayes, 1995, 109)



cooperation, since actors can check on whether and how the other actors are complying with their own obligations and make sure “they are not being taken advantage of”.<sup>621</sup>

Dispute settlement is another managerial strategy to handle the ambiguous provisions of the treaty. The only requirement is that the dispute settlement mechanism should be able to produce “authoritative interpretation of controverted provisions”.<sup>622</sup> Finally, technical and financial capacity-building, usually directed at developing countries, is the last ingredient on the managerial menu.

Downs et al, on the other hand, defy the conclusions reached by the Chayeses, which would be “contaminated by selection problems”.<sup>623</sup> They say that the high level of compliance and the disregard for enforcement measures within some regulatory regimes happened only because those treaties did not require significant behavioural change from states. The claim is that, in these specific regulatory regimes, the parties were required “to make only modest departures from what they would have done in the absence of an agreement”.<sup>624</sup>

According to Downs et al, the more a treaty demands cooperation from states, the more it will need enforcement strategies to avoid cheating.<sup>625</sup> As they say, “the only relevant criterion is that the punishment must hurt the transgressor state at least as much as that state could gain by the violation”.<sup>626</sup> One of the authors’ examples regarding the correlation between deeper cooperation and enforcement measures is the World Trade Organization (WTO). They argue that the institutional purpose of the WTO, which is, by and large, the reduction of trade barriers, was only implemented due to the adoption of harder consequences with respect to violations.<sup>627</sup>

Rather than a competition in which either the managerial or the enforcement models compete for supremacy, both schools are said to complement one another.<sup>628</sup> Indeed, such polarisation seems to be more artificial than real. Even the Chayeses

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<sup>621</sup> Chayes and Chayes, 1995, 22.

<sup>622</sup> Chayes and Chayes, 1995, 24.

<sup>623</sup> Downs et al, 1996, 380.

<sup>624</sup> Downs et al, 1996, 380.

<sup>625</sup> To the authors, the level of cooperation that a treaty is capable of bringing about can be measured by the “extent to which it requires states to depart from what they would have done in its absence”. (Downs et al, 1996, 383)

<sup>626</sup> Downs et al, 1996, 386.

<sup>627</sup> Downs et al, 1996, 391-392.

<sup>628</sup> Koh, 1997, 2639.

recognise the importance that certain informal types of sanctions do have for compliance.<sup>629</sup>

The compliance system of the Kyoto Protocol combined both models. Its declared purpose, again, is “to facilitate, promote and enforce compliance”.<sup>630</sup> The reasons attached to such design can be traced back to the nature of the obligations agreed in the Kyoto Protocol. Differently from the FCCC, the Kyoto Protocol imposes emissions targets and a deadline for developed countries. Each developed country has its own “assigned amounts”, which are based on individualised “quantified emission limitation and reduction commitments”.<sup>631</sup> The goal of these emissions targets is to reduce overall emissions “by at least 5 per cent below 1990 levels in the commitment period 2008 to 2012”.<sup>632</sup> The Kyoto Protocol has also compensated for such hardship. It established three market mechanisms to enable compliance in a cost-effective way: joint implementation, clean development mechanism, and emissions trading.<sup>633</sup>

The combination of emissions targets and market mechanisms could only work properly if reliable information with respect to emissions of developed countries are provided. Otherwise, the general goal of the Kyoto Protocol to comprehensively reduce emissions would be difficult to achieve.<sup>634</sup> In view of that, the emissions of developed countries have to be calculated and reported. According to the Kyoto Protocol, Annex I parties are required to establish a national system to estimate their GHGs emissions and, consequently, to submit this information through annual inventories and national communications.<sup>635</sup>

A compliance system that encompasses both traditional managerial elements and other enforcement techniques, such as sanctions, was judged more suitable to oversee how developed countries conform to their obligations. Werksman points out to two main reasons in favour of the decision of the parties to the Kyoto Protocol to

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<sup>629</sup> The Chayeses argue: “In the background, more generally, there is the threat of various manifestations of disapproval: exposure, shaming, and diffuse impacts on the reputation and international relationships of a resisting party. In the conditions of the new sovereignty, a state’s willful and persistent refusal to comply can mushroom into a situation in which its overall status in the international system is threatened.” (1995, 110)

<sup>630</sup> Decision 27/CMP.1, section I.

<sup>631</sup> Kyoto Protocol, art. 3, paragraph 1.

<sup>632</sup> Kyoto Protocol, art. 3, paragraph 1.

<sup>633</sup> Kyoto Protocol, articles 6, 12 and 17.

<sup>634</sup> Brunnée, 2003, 269.

<sup>635</sup> Kyoto Protocol, article 5, paragraph 1, and article 7, paragraphs 1 and 2.

design a tougher compliance mechanism. First, it would reduce competitiveness concerns, especially among the Annex I parties, since sanctions would presumptively deter non-compliance and, therefore, the risk of free riders. Second, the market mechanisms would gain in integrity as long as the compliance procedure is more determined by rule-oriented features.<sup>636</sup>

## 2.2 Actors

The main actors that operate the compliance system under the Kyoto Protocol are: the COP/MOP, the Compliance Committee (CCKP), the Expert Review Teams (ERTs), and the parties to the Kyoto Protocol themselves. The CCKP, in turn, comprises four decision-making instances: (i) an enforcement branch, (ii) a facilitative branch, (iii) a plenary (which consists of the two previous branches sitting together), and (iv) a bureau.<sup>637</sup>

The *COP/MOP* implemented the compliance system after the approval and adoption of “the procedures and mechanisms relating to compliance under the Kyoto Protocol”.<sup>638</sup> In such procedure, the tasks assigned to the COP/MOP are limited. Apart from providing general policy guidance, its main role consists in deciding appeals.<sup>639</sup> Any Annex I party may appeal to the COP/MOP against a final decision of the enforcement branch. The grounds for such appeal are, nevertheless, restricted to due process issues.<sup>640</sup> And even if the COP/MOP concludes the decisions of the enforcement branch to have violated due process – and it needs a three-fourth majority vote for that – it can only refer the matter back to the branch.<sup>641</sup> It has no self-standing power of invalidation.

The *enforcement branch* of the CCKP has the jurisdiction over the “questions

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<sup>636</sup> Werksman, 2005, 22. As this author explains: “The managerial approach is designed to respond to parties that wish to comply, but lack the financial and technical means of doing so. (...) many perceive the Kyoto Protocol’s commitments as imposing serious economic and political costs on industrialized countries. These countries are donors rather than recipients of development assistance.” And Werksman completes: “markets in these offsets depend upon the regulatory incentives created by a credible compliance system. Offsets and allowances only take on a marketable value when they are in demand by regulators as part of a strong compliance system.” (Werksman, 2005, 22-23)

<sup>637</sup> Decision 27/CMP.1, section II, paragraph 2.

<sup>638</sup> Decision 27/CMP.1.

<sup>639</sup> Decision 27/CMP.1, section XII (a). According to Oberthür and Lefebvre, up to now the COP/MOP has not provided any policy guidance. (Oberthür and Lefebvre, 2010, 138)

<sup>640</sup> As the decision declares: “if that Party believes it has been denied due process.” Decision 27/CMP.1, section XI, paragraph 1.

<sup>641</sup> Decision 27/CMP.1, section XI, paragraph 3.

of implementation” in relation to Annex I parties.<sup>642</sup> It determines whether Annex I parties are in compliance with: (i) quantified emission limitation and reduction commitments; (ii) methodological and reporting requirements; and (iii) the eligibility requirements to participate in the market mechanisms of the Protocol.<sup>643</sup> For each of these three situations, the enforcement branch applies prescribed consequences. Such consequences are not exactly seen as sanctions. They are described as means to restore compliance and to ensure environmental integrity.<sup>644-645</sup>

If the party does not comply with its emissions targets (“situation a”), which is a question that can only be decided after 2012,<sup>646</sup> the enforcement branch shall determine three consequences: *deduction* from the party’s assigned amount for the second commitment period, development of a *compliance action plan*, and the *suspension of the eligibility* to trade emissions.<sup>647</sup> The declaration of non-compliance with reporting requirements (“situation b”) results in the development of a *compliance action plan*.<sup>648</sup> Finally, the non-compliance with eligibility requirements under the market mechanisms (“situation c”) calls for the *suspension of eligibility* under the mechanism.<sup>649</sup>

The *facilitative branch* of the CCKP, in turn, provides “advice and facilitation

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<sup>642</sup> Marrakesh Accords, Decision 24/CP.7 “Procedures and Mechanisms relating to Compliance under the Kyoto Protocol” V.

<sup>643</sup> Decision 27/CMP.1, section V, paragraph 4 (a), (b) and (c).

<sup>644</sup> Decision 27/CMP.1, section V, paragraph 6.

<sup>645</sup> Comparing the competences of the enforcement branch with the mission of two similar bodies under different non-compliance procedures may help putting them in perspective. The non-compliance procedure under the *Montreal Protocol* establishes an Implementation Committee to oversee the compliance of the parties with their commitments. The members of such Implementation Committee, however, do not have the power to decide about compliance. They report their findings and recommendations to the Meeting of the Parties, which is the ultimate decision-making authority of the system. (Decision IV/5, Annex IV, art. 9) The second example is the Compliance Committee set up by the compliance system of the *Aarhus Convention*. This procedure is praised for being innovative as members of the public are allowed to bring communications about compliance of a party with the Aarhus Convention’s commitments before the Compliance Committee. (Decision I/7, art. 18) The members of the Compliance Committee do not decide on compliance, but rather review the case and make recommendations to the Meeting of the Parties, who then decide upon the measures to bring the party into full compliance. (Decision I/7, arts. 13, 14 and 37) Exceptionally, the Compliance Committee may also recommend certain measures to facilitate the compliance of a party with its commitments, but this has to be in consultation and subject to agreement with the party concerned. (Decision I/7, art. 36, (a) and (b))

<sup>646</sup> After 2012 there is still an “additional period for fulfilling commitments”, when the parties to the Kyoto Protocol with emission limitation or reduction commitments can continue acquiring emissions allowances in order to comply with their emissions targets. (Decision 27/CMP.1, Section XIII)

<sup>647</sup> Decision 27/CMP.1, section XV, paragraph 5 (a), (b), (c).

<sup>648</sup> Decision 27/CMP.1, section XV, paragraph 1 (a), (b).

<sup>649</sup> Decision 27/CMP.1, section XV, paragraph 4.

to Parties in implementing the Protocol”.<sup>650</sup> It is the managerial hand of the system. Apart from that, the facilitative branch shares some of the responsibilities given to the enforcement branch “with the aim of promoting compliance and providing for early warning of potential non-compliance”.<sup>651</sup> Therefore, the facilitative branch is responsible to help Annex I parties with their emissions targets and reporting requirements.<sup>652</sup>

The *plenary* of the CCKP does not decide on compliance. This function is the exclusive responsibility of the enforcement and of the facilitative branches. The plenary receives the “questions of implementation”,<sup>653</sup> which shall then be distributed, by the *bureau*, to either the enforcement or the facilitative branches, depending on the issue to be ultimately decided upon and their respective mandates.<sup>654</sup> The plenary, in addition, is the forum to discuss general matters of the system and to exchange information about the activities performed by the two branches.<sup>655</sup> It provides information to the COP/MOP about the decisions that have been taken by them.<sup>656</sup>

The plenary is composed of twenty members: ten from the facilitative branch and ten from the enforcement branch.<sup>657</sup> The COP/MOP elects these members.<sup>658</sup> They are climate change experts, who must serve “in their individual capacities”.<sup>659</sup> They have to agree with a written oath of service that requires independence, impartiality and early warning of potential conflict of interests.<sup>660</sup> The members of the enforcement branch, apart from expertise within the climate change field, must also have legal experience.<sup>661</sup>

In theory, the “formal” independence of each individual member denotes that parties facing a question of implementation before the facilitative or the enforcement

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<sup>650</sup> Decision 27/CMP.1, section IV, paragraph 4.

<sup>651</sup> Decision 27/CMP.1, section IV, paragraph 6. The facilitative branch has already exercised such competence. The branch invited Canada to engage in a dialogue after the release of the ERT’s report on Canada’s fifth national communication, where the ERT expressed the possibility of Canada becoming non-compliant with its commitments under Article 3, paragraph 1, of the Kyoto Protocol. As an answer to such invitation, Canada said that any engagement with the facilitative branch would be useless since it had already submitted a notification of withdrawal from the Kyoto Protocol. (FCCC/KP/CMP/2012/6, Annex II)

<sup>652</sup> Decision 27/CMP.1, section IV, paragraph 6 (a) (b).

<sup>653</sup> Decision 27/CMP.1, section VI, paragraph 1.

<sup>654</sup> Decision 27/CMP.1, section VII, paragraph 1.

<sup>655</sup> This function is the result of practice, according to Oberthür and Lefeber. (2010, 138)

<sup>656</sup> Decision 27/CMP.1, section III.

<sup>657</sup> For each member there is an alternate member. Decision 27/CMP.1, Annex, section II paragraph 3.

<sup>658</sup> Decision 27/CMP.1, section II, paragraph 3.

<sup>659</sup> Decision 27/CMP.1, section II, paragraph 6.

<sup>660</sup> Rules of Procedure, Rule 4 (2).

<sup>661</sup> Decision 27/CMP.1, section V, paragraph 3.

branch do not have to fear political or arbitrary decisions.<sup>662</sup> Experts ought to decide according to the applicable norms and facts put before them, regardless of any political leaning.

Climate change, however, is a subject embroiled in multiple clashing interests. A balance of different points of view and interests needed to be struck in order to design these bodies.<sup>663</sup> The branches are composed of: (a) six members of interest groups within the Climate Change Regime (according to the proportion of one member from each of the five regional groups of the United Nations, and one member from the small island developing States); (b) two members with binding emissions targets from Annex I parties; and (c) two members with no binding emissions targets from non-Annex I parties.<sup>664</sup> They serve for a term of four years, which can be renewed only once.<sup>665</sup>

The antagonism between Annex I and non-Annex I parties is further reflected throughout the procedure. Each branch elects a chairperson and a vice-chairperson: one from an Annex I, and the other from a non-Annex I party. They rotate continually between Annex I and non-Annex I parties.<sup>666</sup> The chairperson and the vice-chairperson from each of the two branches, in turn, compose the bureau.<sup>667</sup>

According to the practice of the CCKP, the chairperson and the vice-chairperson have the responsibility to draft the text of the decisions for their respective branch.<sup>668</sup> The voting procedure once again discloses that antagonism (specially in the realm of the enforcement branch). In both branches, decisions should, in principle, be adopted by consensus. Failing consensus, three fourths (eight out of

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<sup>662</sup> According to Ulfstein and Werksman, the wording of the non-compliance procedure gives the appearance that the members of the branches are detached from the COP/MOP. However, the fact that the COP/MOP elects them opens the possibility of “non-professional factors” being taken into account. (2005, 47)

<sup>663</sup> In fact, the composition of the branches was a highly disputed question in the negotiations. Werksman says that, from the beginning, developing countries pushed for the equitable geographical representation within the branches, which provoked a rift with developed countries. The reason behind the disagreement was the fact that the requirement of an equitable geographical representation led to a majority of developing countries. This was particularly problematic in relation to the composition of the enforcement branch, since only the performance of developed countries would be subject to their jurisdiction. (Werksman, 2005, 28)

<sup>664</sup> Decision 27/CMP.1, section IV, paragraph 1 (a), (b), (c), and V. 1 (a), (b), (c). The five UN regional groups are: Asia-Pacific Group, African Group, Eastern European Group, Latin America and the Caribbean Group, and the Western European and Others Group. The terms of the negotiation are described by Ulfstein and Werksman, 2005, 41-43.

<sup>665</sup> Decision 27/CMP.1, section IV, paragraph 2, and section V, paragraph 2.

<sup>666</sup> Decision 27/CMP.1, section II, paragraph 4.

<sup>667</sup> Decision 27/CMP.1, section II, paragraph 4.

<sup>668</sup> Oberthür and Lefeber, 2010, 136.

ten) of the members decide. In order for decisions of the enforcement branch to be taken, there must be a *quorum* of a majority of Annex I and of non Annex-1.<sup>669</sup> In the light of this requirement, the absence of two members from the Annex I parties could block the decisions of the enforcement branch. It is claimed to be a procedural guarantee for Annex I parties against unreasonable claims advanced by non-Annex I parties.<sup>670</sup>

The *Expert Review Teams* (ERTs) fulfil two main functions within the Kyoto Protocol. The first one is to provide a “thorough, objective and comprehensive technical assessment” of how Annex I parties have been implementing their commitments.<sup>671</sup> When performing these functions, the ERT should advise and give some time for the party to avert potential problems towards compliance. Only if this problem becomes “unresolved” should the ERT indicate it as a question of implementation before the enforcement branch.<sup>672</sup> The second function is to “promote consistency and transparency” when reviewing the information furnished by Annex I parties.<sup>673</sup>

These experts, who are selected from the FCCC roster of experts, serve in their personal capacities. They cannot have any attachment to the party under review, which, in practice, means being of a different nationality and not having received funding or being nominated by it.<sup>674</sup> The composition of the ERTs should strike a balance between experts coming from Annex I and non-Annex I parties.<sup>675</sup> Finally, it is within the job description of ERTs to undertake “in-country” visits to Annex I parties, which must be done with the previous consent of the party being reviewed.<sup>676</sup>

The plenary is responsible to receive questions of implementation that can be raised by any party with respect to itself, by any party with respect to another party, and by the reports of ERTs.<sup>677</sup> The practice of compliance mechanisms in other

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<sup>669</sup> Within each branch, just to make that clearer, there are 4 members from developed countries (two from the Annex 1 countries, one from the Eastern European group and one from the Western European group) and six from developing countries. Therefore, the *quorum* corresponds to 3 from the former and 4 from the latter countries. See Decision 27/CMP.1, section II, paragraph 9. See also Ulfstein and Werksman, 2005, 47.

<sup>670</sup> Ulfstein and Werksman, 2005, 42, 50 and 53.

<sup>671</sup> Decision 22/CMP.1, paragraph 2 (a).

<sup>672</sup> Decision 22/CMP.1, paragraphs 7 and 8.

<sup>673</sup> Decision 22/CMP.1, paragraph 2 (b).

<sup>674</sup> Decision 22/CMP.1, paragraphs 23 and 25.

<sup>675</sup> Decision 22/CMP.1, paragraphs 32.

<sup>676</sup> Decision 22/CMP.1, paragraphs 55 and 56.

<sup>677</sup> Decision 27/CMP.1, section VI, paragraph 1 (a) and (b).

multilateral regimes has shown that the two former hypotheses seldom take place.<sup>678</sup> Therefore, from the beginning, the reports provided by the ERTs were perceived to be the main trigger of the compliance procedure in relation to the commitments of Annex I parties.<sup>679</sup> As a matter of fact, the seven cases so far presented before the enforcement branch were submitted as questions of implementation by the ERTs.

Finally, as the last category of actors, there are *the parties* to the Kyoto Protocol, which comprise both the *Annex I parties*, which have “quantified emission limitation and reduction commitments”<sup>680</sup> and are required to report and calculate its emissions; and the *non-Annex I parties*, which do not have binding emissions targets.

### 2.3 Process

The general task of the CCKP is to monitor whether the parties to the Kyoto Protocol meet their agreed obligations. According to specific criteria, it pursues this task either through the facilitative branch, which aims at aiding the parties to identify effective ways to comply, or through the enforcement branch, which has the power to take more intrusive measures, like a declaration of non-compliance.

Questions of implementation need to fulfil a series of procedural requirements in order to be analysed and decided upon by either branch. The parties concerned are entitled with several judicial-like guarantees. The process of the enforcement branch, due to its more sensitive nature, which reverberates in both the national and the international spheres, is particularly enhanced with these sorts of protections.

Any question of implementation is subject to a “preliminary examination” by the relevant branch. The preliminary examination consists in analysing whether there is sufficient information to proceed with the case and whether the case is not ill founded.<sup>681</sup> The party concerned must be notified of the decision of the branch to proceed or not to proceed with the question of implementation. If the decision of the branch is not to proceed, it must be made public.<sup>682</sup> Otherwise, the decision should be clear about the information on the basis of which the question of implementation is

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<sup>678</sup> Oberthür and Lefeber, 2010, 141.

<sup>679</sup> Ulfstein and Werksman, 2005, 43.

<sup>680</sup> Kyoto Protocol, art. 3, paragraph 1.

<sup>681</sup> Decision 27/CMP.1, section VII, paragraph 2 (a), (b) and (c).

<sup>682</sup> Decision 27/CMP.1, section VII, paragraph 6.



grounded.<sup>683</sup> Furthermore, the party concerned must have the opportunity to comment on such decision.<sup>684</sup>

From this moment onwards, the communication between the party concerned and the branch follows a certain pattern. First, the party concerned has the right to be technically represented before the branch.<sup>685</sup> Second, all information considered must be available so that the party concerned has the possibility to produce its commentaries.<sup>686</sup> Third, decisions must clearly indicate their “conclusions and reasons”.<sup>687</sup> Fourth, the party concerned should always be notified about the decisions of the branch.<sup>688</sup>

The decisions of the branches should be substantiated with information furnished by various actors, namely: the party concerned; the ERTs, in the case of Annex I countries; the party that has submitted the question of implementation, if that is the case; the COP and the COP/MOP, if that is the case; other subsidiary bodies of the FCCC and of the Kyoto Protocol; and, finally, the other branch.<sup>689</sup> Apart from these, other external actors, like intergovernmental and non-governmental organisations, are also allowed to submit information to the relevant branch.<sup>690</sup> As a further guarantee for the party concerned, each branch may seek expert advice.<sup>691</sup> The branch shall identify the experts, define the procedures these experts should follow, and enumerate the questions they should answer.<sup>692</sup>

The policy behind the system is to keep the meetings of the plenary and of the branches open to the public.<sup>693</sup> The date and venue of each meeting should be advertised in advance in the FCCC website. An interested observer can follow the meeting *in loco*, but she has to be previously registered.<sup>694</sup> Alternatively, meetings can be watched through the Internet.<sup>695</sup> Nevertheless, the public is not allowed to be present during the elaboration and the adoption of decisions, which is restricted to the

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<sup>683</sup> Decision 27/CMP.1, section VII, paragraph 4.

<sup>684</sup> Decision 27/CMP.1, section VII, paragraph 7.

<sup>685</sup> Decision 27/CMP.1, section VIII, paragraph 1.

<sup>686</sup> Decision 27/CMP.1, section VIII, paragraph 6.

<sup>687</sup> Decision 27/CMP.1, section VIII, paragraph 6.

<sup>688</sup> Decision 27/CMP.1, section VIII, paragraphs 7 and 8.

<sup>689</sup> Decision 27/CMP.1, section VIII, paragraph 3 (a), (b), (c), (d), (e).

<sup>690</sup> Decision 27/CMP.1, section VIII, paragraph 4.

<sup>691</sup> Decision 27/CMP.1, section VIII paragraphs 5.

<sup>692</sup> Rules of Procedure, Rule 21 (a), (b) and (c).

<sup>693</sup> Rules of Procedure, Rule 9 (1).

<sup>694</sup> Working Arrangement, 2007, paragraph 16, (b).

<sup>695</sup> Working Arrangement, 2007, paragraph 16, (a).

members of the branches and secretariat officials.<sup>696</sup>

The procedure of the enforcement branch has additional guarantees for the party concerned. First, there are specific time limits for the branch to consider the information and adopt decisions, and for the party concerned to submit written commentaries.<sup>697</sup> Moreover, with respect to eligibility requirements of the market mechanisms of the Protocol,<sup>698</sup> there is also a fast track procedure that enables the parties, in case of a positive decision, to be swiftly reinstated into the carbon-offset market without serious losses.<sup>699</sup>

Second, there are additional opportunities for the party concerned to vocalise its opinions. In the event of a decision to proceed with the question of implementation, after the preliminary examination of the case, the party concerned has the possibility to make a written submission rebutting the information used by the enforcement branch. It is also opened to the party the opportunity to request a hearing where it can present its views and expert testimony about the question of implementation.<sup>700</sup>

Following this stage, the enforcement branch may decide to proceed on a preliminary finding of non-compliance or not to proceed with the question. In the first hypothesis, the party concerned has one more opportunity to communicate with the enforcement branch, through a “further written submission”, before a final decision is taken.<sup>701</sup>

Third, the party concerned may appeal to the COP/MOP against the decision of the enforcement branch. This appeal, however, is limited to due process concerns, as seen above. A brief grasp of the cases so far dealt with by the branches help to envision the functioning and dynamics of this process.

## **2.4 Cases**

The cases bring up the issue about the legal character of the CCKP decisions. In particular, it regards the binding nature of a declaration of non-compliance by the

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<sup>696</sup> Rules of Procedure, Rule 9 (2).

<sup>697</sup> Decision 27/CMP.1, section IX, paragraphs 2 and 3, for example.

<sup>698</sup> Decision 27/CMP.1, section X.

<sup>699</sup> Ulfstein and Werksman, 2005, 49.

<sup>700</sup> Decision 27/CMP.1, section IX, paragraphs 1 and 2.

<sup>701</sup> Decision 27/CMP.1, section IX, paragraphs 4, 7, and 8.

enforcement branch. This was a very disputed matter during the period the compliance procedure was negotiated.<sup>702</sup> At the bottom of such controversy is the rule of article 18 of the Kyoto Protocol, which determines the need to amend the Kyoto Protocol in order to secure the binding character of the compliance system.<sup>703</sup>

Many delegations, both in favour of and against legally binding consequences, saw the requirement of article 18 as problematic. Apart from being time-consuming, a labourious amendment process could disturb the fair treatment among the parties. After all, only the parties that have their related decision ratified by amendment would be bound by it.<sup>704</sup> In the end, the topic proved little workable politically and no clarification on that legal character was ever issued.<sup>705</sup> According to Werksman, however, the mandatory language of the compliance procedure and the hard consequences that can be applied by the enforcement branch compensates for the lack of agreement on legally binding consequences.<sup>706</sup>

As of date, the facilitative branch has faced only one case whereas the enforcement branch has reached a final decision on seven cases (Greece, Canada, Croatia, Bulgaria, Ukraine, Romania, and Lithuania) and still proceeds with one more case (Slovakia). The five former cases will be shortly described below as examples of the concrete functioning of such procedures.

#### ***2.4.1 Facilitative Branch***

The only question submitted to the facilitative branch to date was triggered, in 2006, by South Africa on behalf of the Group 77 and China. It was proposed against fifteen Annex I countries due to their alleged lack of reported progress in achieving their commitments under the Protocol.<sup>707</sup> This question of implementation ended

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<sup>702</sup> As Werksman puts it, “the alpha and omega of the negotiations”. (2005, 31)

<sup>703</sup> Kyoto Protocol, art. 18.

<sup>704</sup> Werksman, 2005, 31. The amendment procedure is described in art. 20. The hurdles of the procedure range from the fact that it needs to be accepted by the parties and that there is a long time lag between the proposal of the amendment and its entry into force. Art 20.2 “(...) The text of any proposed amendment to this Protocol shall be communicated to the Parties by the secretariat at least six months before the meeting at which it is proposed for adoption.” Art. 20.4 “An amendment adopted in accordance with paragraph 3 above shall enter into force for those Parties having accepted it on the ninetieth day after the date of receipt by the Depositary of an instrument of acceptance by at least three fourths of the Parties to this Protocol.”

<sup>705</sup> Werksman, 2005, 32.

<sup>706</sup> Werksman, 2005, 32.

<sup>707</sup> CC, South Africa, 2006a.

without any formal decision from the branch. Both a decision to proceed and a decision not to proceed were attempted but equally failed to reach the required majority of three-fourths of the members.<sup>708</sup> The draft of the decision not to proceed puts forward the several procedural doubts about the particularities of the case: whether it was possible for a group of parties to present submissions; whether the submission had named each one of the parties concerned; and whether the question of implementation had been clearly identified.<sup>709</sup> Because none of these three questions were clearly regulated, the body did not manage to overcome the stalemate. This frustrating result has sparked procedural improvements that will be dealt with later in the chapter.

### ***2.4.2 Enforcement Branch***

#### **a) Greece**

The ERT raised a question of implementation concerning the Greek national system of emissions calculation. According to the report of the ERT, the deficiencies of such system referred to institutional, procedural and competence of the Greek technical staff.<sup>710</sup> The enforcement branch, on a preliminary analysis, decided to proceed with the question of implementation and sought expert advice.<sup>711</sup> In its written submission, Greece explained that the gaps highlighted by the ERT were the outcome of a transitional period, and that the country had since implemented an improved version of its national system.<sup>712</sup> The enforcement branch, based on expert advice, declared the country to be in non-compliance with its reporting requirements and, consequently, suspended it from participating in the market mechanisms while pending decision about the question of implementation.

Concretely, the enforcement branch determined that Greece should develop a plan in order to demonstrate measures to ensure the good continuity of its national system of emissions calculation.<sup>713</sup> Greece presented a further written submission

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<sup>708</sup> CC, South Africa, 2006b.

<sup>709</sup> CC, South Africa, 2006b, 4 (a), (b), (c).

<sup>710</sup> CC, Greece, 2007, paragraph 244.

<sup>711</sup> CC, Greece, 2007a.

<sup>712</sup> CC, Greece, 2007b.

<sup>713</sup> CC, Greece, 2007c, paragraphs 18 (a), (b), and (c).

where it challenged the decision of the enforcement branch based on the fact that its greenhouse gases emissions inventory, together with the inventory of the whole European Union, had been presented before the FCCC Secretariat and had been successfully approved.<sup>714</sup> In a final decision, the enforcement branch maintained its preliminary findings and reasoned that the EU inventory could not adjust for the deficiencies specifically found in Greece's national system.<sup>715</sup>

Submitted to a new ERT scrutiny, the new national system of Greece was reported to be operational and capable of assembling timely inventories.<sup>716</sup> The enforcement branch determined that the question of implementation with respect to Greece was resolved and that the country could be reinstated into the market mechanisms.<sup>717</sup>

## **b) Canada**

In 2008, the ERT raised a question of implementation in relation to Canada's national registry for accounting its assigned amounts. In accordance with the report of the ERT, such national registry was not in conformity with certain provisions of the Kyoto Protocol.<sup>718</sup> The question was allocated to the enforcement branch since it refers to reporting requirements. On a preliminary analysis, the branch decided to proceed with the question of implementation and sought expert advice.<sup>719</sup> Canada clarified that, by the time the ERT produced its report, the country's national registry had not been completely implemented, but that it has since managed to successfully enact it. Canada then urged the enforcement branch to decide not to proceed with the question of implementation.<sup>720</sup> Based on Canada's written submission and on the expert advice, the enforcement branch decided not to proceed further. The phrasing of such decision, however, brought out uncertainty regarding the status of Canada. At a certain point, the decision declared that: "(a) the status of Canada's national registry resulted in non-compliance with the guidelines and the modalities on the publication date of the review report", and (b) "there is a sufficient factual basis to avert a finding

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<sup>714</sup> CC, Greece 2007d.

<sup>715</sup> CC, Greece 2007e.

<sup>716</sup> CC, Greece 2007f, paragraph 164.

<sup>717</sup> CC, Greece 2007g, paragraph 13.

<sup>718</sup> CC, Canada, 2008a, paragraphs 139-140.

<sup>719</sup> CC, Canada, 2008b.

<sup>720</sup> CC, Canada, 2008c, paragraphs 3, 8 and 18.

of non-compliance on the date of this decision.”<sup>721</sup>

The use of the word “non-compliance” was heavily criticised by Canada. According to a further written submission, Canada welcomed the decision of the enforcement branch not to proceed, but it argued that the branch had overstepped its competence when it declared, nonetheless, that Canada was not in compliance with its commitments. In Canada’s view, the substance of the decision was misleading since Canada had never been declared to be in non-compliance and, besides, the situation that could potentially steer into non-compliance was resolved. Canada then suggested that the word “non-compliance” should be excluded from the decision.<sup>722</sup> There is no further decision on the matter, but such submission was annexed to the annual report of the compliance committee to the COP/MOP.<sup>723</sup>

### **c) Croatia**

The ERT brought up a question of implementation in relation to Croatia’s calculation of its assigned amount, which was supposedly not in conformity with some provisions of the Kyoto Protocol.<sup>724</sup> The enforcement branch, on a preliminary examination, decided to proceed and sought expert advice.<sup>725</sup> In a written submission, Croatia argued that the calculation of its assigned amount was in tune with a decision undertaken within the FCCC. That decision allowed a degree of flexibility for countries undergoing the process of transition to a market economy, and, in Croatia’s view, the Compliance Committee should take that determination into account.<sup>726</sup> The enforcement branch, in a preliminary finding, reasoned that the Kyoto Protocol has a different degree of flexibility for countries undergoing the process of transition to a market economy and that any decision taken under the FCCC needed also to be analysed by the highest decision-making body of the Kyoto Protocol (the COP/MOP). That did not happen.

Croatia was then declared to be in non-compliance, not eligible to participate in the market mechanisms under the Protocol, and finally constrained to develop a

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<sup>721</sup> CC, Canada, 2008d, paragraph 17 (a) and (b).

<sup>722</sup> CC, Canada, 2008e.

<sup>723</sup> Annual Report of the Compliance Committee 2008, paragraph 30.

<sup>724</sup> CC, Croatia, 2009a, paragraph 157.

<sup>725</sup> CC, Croatia, 2009b.

<sup>726</sup> CC, Croatia, 2009c.

plan to address the calculation of its assigned amount.<sup>727</sup> In a further written submission, Croatia urged the enforcement branch to reconsider its position.<sup>728</sup> However, the enforcement branch confirmed its preliminary findings and added that it was not within the competences of the enforcement branch to address the specific circumstances of Croatia.<sup>729</sup>

Croatia appealed against the final decision of the enforcement branch to the COP/MOP, but withdrew it. Although the appeal was not formally analysed by the COP/MOP, it prompted a technical paper, at the request of the COP/MOP, to understand the scope and the law that is applicable to appeals under the compliance procedure of the Kyoto Protocol.<sup>730</sup>

Croatia submitted a plan related to the calculation of its assigned amount, together with a request to the enforcement branch to reinstate the country into the market mechanisms. The enforcement branch decided to postpone the decision regarding the reinstatement of Croatia in view of the fact that Croatia's plan still did not meet all the requirements.<sup>731</sup>

Croatia submitted a new revised plan and reasoned that it is now able to accept "the values calculated by the ERT that conducted the review of Croatia's initial report".<sup>732</sup> Croatia, then, once again, requested its reinstatement into the market mechanisms. In view of Croatia's revised plan, the enforcement branch decided that the question of implementation was resolved and declared Croatia's eligibility to participate in the market mechanisms.<sup>733</sup>

#### **d) Bulgaria**

The ERT found problems in the national system of Bulgaria and identified it as a question of implementation. According to the report of the ERT, it was not in tune with FCCC reporting requirements nor with the IPCC guidelines. More specifically, it was not "sufficiently transparent, consistent, comparable, complete and

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<sup>727</sup> CC, Croatia, 2009d, paragraphs 15, 21 (a), and 23 (a), (b), (c).

<sup>728</sup> CC, Croatia, 2009e.

<sup>729</sup> CC, Croatia, 2009f, paragraph 4.

<sup>730</sup> FCCC/TP/2011/6, Mandate.

<sup>731</sup> CC, Croatia, 2009i, paragraphs 3 and 9.

<sup>732</sup> CC, Croatia, 2009j, 3.

<sup>733</sup> CC, Croatia, 2009l, paragraph 12.

accurate”.<sup>734</sup> The enforcement branch decided to proceed with the question and sought expert advice.<sup>735</sup> In a written submission, Bulgaria reported its progress to tackle the deficiencies spotted by the ERT.<sup>736</sup>

In a preliminary finding, the enforcement branch took into account the facts presented by Bulgaria in its written and oral submissions as well as the advice received from the invited experts. Although the branch noted progress, that was not sufficient to ensure the operation of Bulgaria’s system in accordance with the guidelines for national systems. Bulgaria was declared to be in non-compliance, not eligible to participate in the market mechanisms, and constrained to develop a plan to address the problems found in its national system.<sup>737</sup>

In a further written submission, Bulgaria challenged a specific passage from the preliminary finding as falling outside the mandate of the enforcement branch. According to such passage, the experts predicted improvements in the quality of Bulgaria’s annual submission around the year of 2011. In Bulgaria’s view, the enforcement branch should not be prone to make predictions and requested the passage to be removed from the text of the preliminary finding.<sup>738</sup>

In a final decision, the enforcement branch confirmed its preliminary finding and noted that the branch is authorised to seek expert advice and that Bulgaria could request the reinstatement of its eligibility at any time.<sup>739</sup> Bulgaria submitted a compliance action plan in accordance with the final decision,<sup>740</sup> and went through another ERT review. The new report of the ERT confirmed that Bulgaria’s national system is performing in accordance with FCCC and IPCC provisions, which, among other reasons, led the enforcement branch to decide that the question of implementation with respect to Bulgaria was resolved.<sup>741</sup>

#### **e) Ukraine**

The ERT raised a question of implementation in relation to Ukraine’s national

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<sup>734</sup> CC, Bulgaria, 2010a, paragraph 194.

<sup>735</sup> CC, Bulgaria, 2010b.

<sup>736</sup> CC, Bulgaria, 2010c.

<sup>737</sup> CC, Bulgaria, 2010d, paragraphs 16 and 20 (a), (b), and (c).

<sup>738</sup> CC, Bulgaria, 2010e, paragraphs 12, 16 and 17.

<sup>739</sup> CC, Bulgaria, 2010f.

<sup>740</sup> CC, Bulgaria, 2010h.

<sup>741</sup> CC, Bulgaria, 2010i, paragraph 15.



system for estimating anthropogenic greenhouse gas emissions because, as in the previous case, it was not “sufficiently transparent, consistent, comparable, complete and accurate”.<sup>742</sup> The enforcement branch decided to proceed and sought expert advice.<sup>743</sup> In an extensive written submission, Ukraine purported to demonstrate that the question of implementation has been fully resolved.<sup>744</sup>

On its preliminary findings, the enforcement branch, which declared having taken into account Ukraine’s written and oral submissions as well as the guidance of experts, noted that there were still unsolved problems within the operation of the country’s national system. Ukraine was then declared to be in non-compliance, not eligible to participate in the market mechanisms, and constrained to develop a plan to address the problems of its national system.<sup>745</sup> In a further written submission, Ukraine maintained that the enforcement branch erred when it did not consider, in its preliminary findings, Ukraine’s special circumstances: a country undergoing the process of transition to a market economy, which calls for an extra flexibility in decision-making. Substantively, Ukraine requested the branch to defer its final decision until the country could have a new review of ERT.<sup>746</sup> The branch confirmed its preliminary findings and, coherently following the rationale adopted in the Croatia’s case, added that it is not within its competence to defer decisions or to grant flexibility in the absence of a decision from the COP/MOP.<sup>747</sup>

As a consequence of the enforcement branch’s decision, Ukraine presented a plan with a view to solving the situation that originally led to its non-compliance. According to Ukraine’s declaration, the plan was a “detailed and updated account of its efforts to comply”.<sup>748</sup> Ukraine then requested the enforcement branch to reinstate its eligibility to participate in the mechanisms under Articles 6, 12, and 17 of the Kyoto Protocol.<sup>749</sup> In its final decision, the enforcement branch, based on the ERT’s report and expert advice, verified that Ukraine’s national system and annual

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<sup>742</sup> CC, Ukraine, 2011a, paragraph 184.

<sup>743</sup> CC, Ukraine, 2011b.

<sup>744</sup> CC, Ukraine, 2011c.

<sup>745</sup> CC, Ukraine, 2011d, paragraphs 18 and 24 (a), (b) and (c).

<sup>746</sup> CC, Ukraine, 2011e, paragraphs 18-38 and 53 and sequel.

<sup>747</sup> CC, Ukraine, 2011f.

<sup>748</sup> CC, Ukraine, 2011g, paragraph 10.

<sup>749</sup> CC, Ukraine, 2011h.

submission were prepared in accordance with guidelines. The enforcement branch decided to reinstate Ukraine's eligibility to participate in the market mechanisms.<sup>750</sup>

### **3. Accountability structures**

The institutional configuration presented above reveals the central features of the power relations that underlie the compliance procedure of the Kyoto Protocol. This section attempts to sketch these features through the accountability lenses. The coordinates of accountability enable us to depict the interactions between the CCKP, organically considered, and the parties to the Kyoto Protocol in two different perspectives.

First and foremost, again, the CCKP is supposed to be an account-holder of the parties to the Kyoto Protocol – the signatory states. The CCKP holds them to account whenever it decides questions of implementation or monitors their behaviour through technical reports. Together with ERTs, if that is the case, and based on expert advice, the enforcement branch has to determine whether the parties have been discharging their agreed duties (related to emissions targets, reporting rules and eligibility requirements). If the parties have not, that branch has to establish the consequences that should be applied to the non-compliant behaviour. All these acts cannot ensue but through quasi-judicial litigious procedures and on the basis of public reasons that ground each decision. This requirement offers the parties the possibility to engage with and expose how the authority of the branches is being exercised. Formal constraints of coherence – of ‘deciding like cases alike’, with a credible notion of ‘likeness’ – shape this argumentative onus. The maintenance of the integrity, publicness and transparency of these procedures, thus, are part of the conditions upon which the legitimacy of the CCKP, as it happens with many other courts, depends.

Resorting again to the coordinates of accountability, one notes that the relationship between the CCKP and the parties is formal and legalised. Previously enacted legal rules specify the authority of each branch, regulate how questions of implementation are to be brought before the branches, and the procedural guarantees any party concerned (and additional actors, like NGO's) should be granted. The

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<sup>750</sup> CC, Ukraine, 2011i.

interaction is established directly, without the need of surrogates. The centre of command of this accountability relationship is clearly identifiable according to explicit legal criteria, a characteristic that avoids jurisdiction overlap. Therefore, the mechanism adopts a unitary rather than a pluralistic or multilateral mode of accountability.

One can reasonably tell, from the pattern of cases depicted above, that the CCKP has so far been successful in bringing states to a path of compliance. The cases themselves cannot prove, indeed, that every single occasional act of non-compliance has been captured by and has formally reached the CCKP. Still, one can plausibly maintain that the set of cases, at the very least, indicates that very distinct countries, among the Annex I list, have displayed a good level of concern with rectifying its diagnosed non-compliant practices so as to avoid bearing the repercussions and actual costs that a declaration of non-compliance entails domestically and internationally.

From a second perspective, the CCKP may itself be held accountable,<sup>751</sup> however appropriately or not, by two potential account-holders: (i) formally and directly, by the COP/MOP; (ii) informally and somewhat indirectly, by the group of parties and the general public. Let me elaborate on that.

The COP/MOP is the decision-making body that represents the parties to the Kyoto Protocol as a whole. Unlike the Clean Development Mechanism (CDM), which is hierarchically subordinated to the COP/MOP's ultimate authority, as later described by chapter 6, the institutional architecture of the CCKP gives the COP/MOP a fairly limited sort of formal authority over the facilitative and the enforcement branches. The COP/MOP is in charge of providing general policy guidance and of deciding upon a single type of appeal: the one concerned with due process questions.<sup>752</sup> That is, the CCKP is formally sovereign with respect to the technical judgments it delivers, because these decisions are non-reviewable on their substance. And even if the COP/MOP picks out a breach of due process by the CCKP, it may only refer the matter back to the branch.<sup>753</sup> This potential accountability link, if one can plausibly claim so, is a rather thin one.

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<sup>751</sup> In a broader perspective, as I mentioned earlier, this can be conceived as 'second-order' accountability.

<sup>752</sup> Decision 27/CMP.1, Section XII.

<sup>753</sup> Decision 27/CMP.1, section XI, paragraph 3.

The COP/MOP, nevertheless, also determines the composition of the two branches. The power to elect decision-makers is traditionally conceived as a mechanism to set a principal-agent relationship grounded on the idea of representativeness. However hard it might be to square a principal-agent relationship *with* the nomination of experts that are expected to be impartial and independent, this is surely not a unique feature of this compliance system.<sup>754</sup> If, on the one hand, members of both branches have a measure of stability during their four years term, on the other, the possibility of having their term renewed once by the COP/MOP may affect that impartiality. That is, the arrangement opens for the COP/MOP the possibility of *ex post* assessment of the performance of the respective member when deciding upon his or her term renewal. The CCKP, here, becomes accountable “as many” (according to the respective individual performances).

There is still more to be told with regards to the branches’ and the ERTs’ composition. The deep-seated tension between developed Annex I and developing non-Annex I countries to the Kyoto Protocol (and to the climate change issue as a whole) is reflected and institutionally expressed across the board. The struggle for the equitable and balanced composition needs to be managed by the COP/MOP when electing the experts of the two branches and when choosing the experts of the ERTs. The demand for equilibrium also resurfaces in the division of labour between the chairperson and vice-chairperson of each branch and in the qualified quorum that is needed for each branch to make a decision (which gives relevant veto power to the experts from both types of countries). Members of both branches and of the ERTs serve in their individual capacities, that is, as climate change experts rather than political representatives with an interested agenda. Nonetheless, in such an explosive political context, nationalities unavoidably matter.

Finally, apart from being peculiarly accountable to the COP/MOP, one should not ignore how the CCKP is diffusely accountable to the general public and to the interest groups of climate change. This accountability facet is a product of mutual monitoring: the CCKP is held accountable to the group of parties and interest groups that mutually check on each other with respect to how commitments are being followed and simultaneously track how the branches of the CCKP handle this

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<sup>754</sup> This tension between political nomination of experts and their expected impartiality is common in national and international bureaucracies. This is usually handled through the mechanism of ‘tenure’.

matter.<sup>755</sup> The Chayeses had pointed out this dimension of accountability by stressing that compliance is enhanced whenever each party is assured that it is not “being taken advantage of”.<sup>756</sup> It is in this sense that the group of parties inspects how the CCKP is dealing with questions of implementation. This type of accountability takes place through the less formal means of pressure and public exposure. These subtle informal sanctions, which can culminate in more serious ones, like sheer disregard or open and outspoken non-compliance, might become feasible as the institutions loses its respectability.

In a nutshell, who accounts to whom? The facilitative and the enforcement branches account primarily to the COP/MOP, which has the formal power to review the appeals grounded on due process and, most of all, to elect and re-elect the members of the branches, a power that naturally creates informal channels of intramural influence and pressure. The branches may also be held accountable by interest groups and parties that monitor the consistency of their work. For what and how? For the task of supervising the compliance system and deciding, in a judicial-like manner, the questions of implementation. When? Along the whole process of monitoring and of decision-making. On the basis of which standards? The procedural guarantees and the technical substantive targets defined in the Kyoto Protocol. Under pain of what consequences? When the CCKP is grasped as the sum of experts acting in their individual capacities (*as many*), the possibility of not having their terms renewed is an important concern for the members of each branch. When the branches are seen in their organic institutionality (*as a whole*), their performance can be publicly questioned by the parties, an informal process that could drive the compliance system into a legitimacy crisis.

#### **4. Test of appropriateness: which accountability for what institutional purpose?**

This section proceeds with a normative test: how appropriate are the accountability arrangements of the mechanism that was set up to be the chief

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<sup>755</sup> Handl gives an economic explanation for the accountability component in non-compliance procedures. He says: “as the economic cost of compliance with such environmental regulations rises, states have an increased interest in making sure that other states, subject to the same international regulations, live up to their obligations, thereby ensuring competition on a level playing field”. (1997, 31)

<sup>756</sup> Chayes and Chayes, 1995, 22.

enforcement device under the Kyoto Protocol? Put differently, it attempts to reflect upon ‘how the guardian should be guarded’. I do not intend to ask the descriptive question – ‘how is the guardian being guarded?’ – nor the explanatory one – ‘why is it being guarded this way?’ – both of which escape the feasible scope of this thesis and the competence of the author. Before answering that normative question, however, I start by pondering over some aspects of the cases that have challenged the facilitative and the enforcement branches to improve their procedures.

#### ***4.1 First-order accountability: cases and procedural improvements***

The reported deadlock that has occurred with the first and only case submitted before the facilitative branch raises an important inquiry, especially if such case is compared with the ones presented before the enforcement branch. The facilitative branch, unlike the enforcement branch, does not declare a country to be in non-compliance with its commitments. Its competence to advise and facilitate compliance is, in many aspects, a common one in other multilateral environmental agreements, and yet the parties did not reach an agreement with a preliminary examination of the situation.

It is difficult to speculate on why the case ended prematurely. Even the most straightforward explanatory hypothesis, which would be the mistrust sparked by a case originally presented by non-Annex I parties against Annex I parties, seems to be misleading. Despite the majority of non-Annex I parties within the facilitative branch (six out of ten), they did not vote together on the matter.

Oberthür and Lefeber explain that the stalemate was partially diagnosed as a result of the *lack of clear procedural standards* regarding submissions. In order to make up for the shortfall, the Rules of Procedure were amended so as to require (i) the names of the submitting party and of the party concerned, (ii) the provision of the Kyoto Protocol that grounds the question of implementation, (iii) a clear identification and corroborating information about the question of implementation, among other things.<sup>757</sup>

In turn, when it comes to the questions of implementation that fall into the jurisdiction of the enforcement branch, the cases show the branch’s engagement, for

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<sup>757</sup> Oberthür and Lefeber, 2010, 141 and 143. See CCKP Rules of Procedure, Rule 14, 15, and 18.

the most part, with the parties' national system for estimating GHGs emissions and their reporting requirements. It is a crucial moment for both the enforcement branch and the parties, since these inventories will be essential to calculate the compliance of developed countries with their emissions targets. So far, it is possible to identify three relevant features of the system.

First, findings and recommendations of experts carry a great weight within the decisions of the enforcement branch. As said, the ERTs have been the main actor to challenge the reports of the parties. They have triggered each one of the proceedings by spotting problems or potential obstacles towards compliance. In some cases, such as the question involving Greece, the close cooperation between the ERT and the party concerned seemed essential to solve the matter.<sup>758</sup> Expert advice is a second example of this claim. Despite the ambivalent wording of the legal provision ("each branch may seek expert advice"),<sup>759</sup> the enforcement branch has always availed itself of such instrument. The experts have assisted the members of the enforcement branch with the content of the ERTs' report, which comprehensively can be filled up with technical references.

Second, the enforcement branch perceives this initial period of questions of implementation as an ongoing learning process to enhance its decision-making process. In 2008, with the benefit of hindsight, the branch undertook a stocktaking exercise in order to "look back at the branch's work for the year and to reflect on improvements that can be made to its consideration of question of implementation".<sup>760</sup> From such exercise, certain amendments to the Rules of Procedure regarding deadlines and representation were proposed.<sup>761</sup> Additionally, it was agreed that the members of the enforcement branch should explain their

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<sup>758</sup> The decision states: "The expert review team (ERT) concluded that the national system of Greece is performing its required functions, as set out in the annex to decision 19/CMP.1. The ERT further concluded that the institutional, legal and procedural arrangements of the new national system are fully operational, and that Greece has the capacity, including relevant arrangements for the technical competence of staff within the national system, to plan, prepare and manage inventories and their timely submission to the secretariat. During the review, no questions of implementation were identified by the ERT. The review report also confirmed that the ERT had in-depth discussion on all aspects of the national system with the relevant staff, and that the transfer of information and data from the institution with previous technical responsibility for the inventory preparation to the new team has been completed". (CC, Greece 2007g, paragraphs 7 and 8)

<sup>759</sup> Decision 27/CMP.1, Section VIII, paragraph 5.

<sup>760</sup> Compliance Committee, List of issues for enforcement branch stocktaking exercise, 24 September 2008, CC/EB/6/2008/2.

<sup>761</sup> Such amendments were accepted by the COP/MOP, Report of the Conference of the Parties serving as the meeting of the Parties to the Kyoto Protocol on its fourth session, held in Poznan from 1 to 12 December 2008, FCCC/KP/CMP/2008/11/Add.1.

dissenting votes in future decisions. It was decided that such stocktaking exercises should remain a periodical effort to develop the activities of the enforcement branch further.<sup>762</sup>

Third, the lack of binding consequences did not prevent the parties from engaging with the decisions of the enforcement branch. According to the cases, the concerned parties took every opportunity to respond to the findings of the enforcement branch and, in some cases, made an effort to bring themselves into compliance.<sup>763</sup> Such behaviour could be the outcome of two determinants.

The first, and perhaps more realistic, is that there are tangible losses for the parties that do not comply with their commitments. Greece, Croatia, Bulgaria, and Ukraine were all declared, at a certain point, not eligible to participate in the market mechanisms. Such decision has a direct impact on the rights of the parties and, consequently, on the cost of their compliance.<sup>764</sup> The second cause is that there are other types of damages contained in any declaration of non-compliance. Canada's case is a good example. Canada was not declared to be in non-compliance, but when the enforcement branch mentioned such term in the decision it provoked a strong reaction. This could be evidence that few countries regard the tag "non-compliant state" of no concern even if such declaration and the consequences attached to it are not legally binding.

#### ***4.2 Second-order accountability: handling political pressure***

The test of appropriateness was stipulated as an examination of how the institutional purpose and the desired accountability functions attached to it (or the inevitable imbrication between both) are reflected in the body's institutional design. In order to be regarded as a normatively legitimate decision-maker, the CCKP must be held accountable not in whatever way, but in an appropriate way as defined by a normative discourse. This truism is derived from the comprehensive concept of

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<sup>762</sup> Compliance Committee, Report on the Sixth Meeting of the Enforcement Branch, 30 October 2008, CC/EB/6/2008/3, paragraphs 6-9.

<sup>763</sup> Werksman and Herbertson argue that, "while it is operating on somewhat unstable legal grounds due to the language in Article 18, the KP's Compliance System is developing an important track record in promoting compliance." (2010, 130)

<sup>764</sup> According to Oberthür and Lefeber: "There can be little doubt, however, that the application of consequences by the EB is effective even without a formally binding status (...). Its consequences are self-enforcing, even though their continued effectiveness depends on the creation of subsequent commitment periods (...)." (2010, 151)



accountability described and endorsed by chapter 1 and further contextualised by chapter 2.

The central role of the CCKP, once again, is to verify whether and how the parties to the Kyoto Protocol comply with their obligations, and to decide what ‘consequences’ should ensue in case of non-compliance. The CCKP has so far overseen, with the aid of experts, the accuracy of the parties’ national systems for estimating emissions, as well as their inventories and communications. Such oversight aims at enabling the parties to present more accurate information with regards to GHGs emissions – an essential step in the final verification of the parties’ compliance with their 2012 emissions targets.

As far as the procedure of the enforcement branch is concerned, it has a judicial-like character that emphasises the need to give the concerned parties enough opportunities to challenge the branches’ or the ERTs’ assertions, to respect strict deadlines, and to commit to public reason-giving based on expert information. As to the facilitative branch, according to earlier description, procedures are more flexible and collaborative. They intend to push the parties into compliance. In both domains, there are possibilities for the participation of external actors, like intergovernmental and non-governmental organisations.

The type of standard through which the decisions of the branches can be appraised, thus, lies somewhere in between the compliance-based and the integrity-based systems. On the one hand, in order to establish the consequences that should be applied against parties that were declared in non-compliance, the enforcement branch does not have discretion (except the one that is conceivably inherent to legal interpretation).<sup>765</sup> There are fixed consequences for each of the non-compliant situations. In this particular respect, the members of the enforcement branch are expected to be rule-followers. As earlier described, only with regards to the “compliance action plans” are the members of the enforcement branch given some leeway to review and assess the content of such proposals.<sup>766</sup> The facilitative branch, in turn, has a higher degree of discretion to apply the consequences “taking into

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<sup>765</sup> See Decision 27/CMP.1, section XV, paragraphs 1, 4 and 5.

<sup>766</sup> See Decision 27/CMP.1, section XV, paragraphs 2 (a), (b), (c) and 6 (a), (b), (c). According to Ulfstein and Werksman, due process would be better achieved if the system could strike a balance between the automaticity of consequences while still conferring some discretion to the members of the enforcement branch to consider the differences of each case. (2005, 41)

account the principle of common but differentiated responsibilities and respective capabilities”<sup>767</sup>.

Technically, the power exercised by the CCKP as a whole is not coercive or legally binding. Nevertheless, as the cases indicate, the CCKP still exerts a non-negligible constraint upon the parties. In spite of the relevant differences between both branches, their common purpose is probably less original and epistemically intricate than the one played, for example, by the IPCC. Still, their responsibility is not politically lighter. In the unsteady and legally fragile territory of international relations, holding states to account, according to the laws of action and reaction of *realpolitik*, may well backfire. As a matter of institutional survival, therefore, institutional devices should equip the body to bear such impact and to withstand this political burden or pressure.

Under such decisional context, three main functions of accountability are naturally at stake. First, accountability structures have a clear expert-based *epistemic* function that combines legal/adjudicative and managerial aspects distributed between both branches. Second, the *democratic* function is also manifested in who gets the chance to somehow participate in and contribute to the process besides the concerned party itself. Third, accountability structures seek to deliver the *populist* dividend of respectability and hence compliance with CCKP’s decisions by means of the balanced composition of both branches with experts from developed and developing countries. This is a sort of representativeness that cannot exactly be seen as democratically-oriented, because the determinant variable is not the proportionality among the represented countries or peoples. It can rather be seen as strategically and geopolitically-oriented representativeness.

Thus, distinct currencies of accountability are simultaneously in play. This co-existence, as argued by chapter 1, is rarely untroubled. Tensions might specially arise, in the current case, between the expert-based epistemic demand and the populist demand for a particular kind of representativeness in the composition of the bodies. The challenge, again, is to keep both plates spinning: to insulate experts so that their impartiality remains credible and trustworthy, and to concede that the not-so-democratic power-equilibrium between developed and developing countries,

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<sup>767</sup> Decision 27/CMP.1, section XIV.

translated by the body's membership rules, is a pragmatic necessity for the sake of the effectiveness of the body.

Displaying impartiality in spite of the geopolitical component that is embedded within the body's composition is, thus, a core institutional hurdle to be faced by the CCKP. One should have already perceived that most of the GAL principles are somehow lurking behind the overall CCKP's procedures, and have even oriented the few reforms undertaken along the years. Documents, sessions and decisions are subject to *transparency* rules, decisions need to be *justified*, the nomination of decision-makers takes into account the *representation* of their respective geopolitical provenance, and third parties have specific opportunities to *participate* in the process. As for the *revisability*, there is a right to appeal to the COP/MOP, however weak and limited that is.

Rather than simply identifying the *presence* of GAL devices, the analyst needs to observe the *form of their presence* and check whether and how they might help to smooth the tension between the epistemic and the populist functions as characterised above. That is, she needs to spot whether and how those principles manage to neutralise or minimise the perception of political bias that may naturally derive from the polarised interest structure reflected within the CCKP.

Expert-based public reason-giving is a first requirement that helps the body to display an appearance of impartiality and, to some extent, constrains it towards truly impartial decision-making. Apart from that, the four years tenure of the experts may also shield them from political interference. In addition, unlike the Implementation Committee of the Montreal Protocol and the Compliance Committee of the Aarhus Convention, which are more clearly subordinated to the respective meeting of the parties,<sup>768</sup> the CCKP enjoys broader independence to decide on questions of compliance. As for the participation of external actors, an opportunity is given to them to provide information and to engage with the CCKP, although these actors do not have any decisional weight that a strict principle of proportional representation would require.

This is how, in sum, the GAL principles get instantiated in the CCKP and articulate the three accountability functions that bear upon the body (epistemic, democratic and populist). Besides, from the point of view of GAL, or, in other

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<sup>768</sup> This was already explained by an earlier footnote.\*

words, from the definitional premises of accountability offered by GAL, the few procedural reforms undertaken by the CCKP have made the body gradually more accountable. It is early to assess whether, from the angle of GAL, there is still something missing or any remaining procedural gap. From what GAL's framework is able to illuminate, the procedural features of the CCKP has evolved in the right direction.

## 5. Conclusion

It has become a commonplace, when talking about compliance in international law, to resort to Henkin's vivid and ironic statement aired in his classic book: "Almost all nations observe almost all principles of international law and almost all of their obligations almost all of the time."<sup>769</sup>

This sociological statement is artfully ambivalent, and can be interpreted through either pessimistic or optimistic light. Somehow, though, it summarises the core challenge of international law. When it comes to post-Westphalian regimes, in which transnational bodies enjoy greater decision-making autonomy, that challenge gets more acute.

The compliance system devised by the Kyoto Protocol addresses Henkin's concern with an innovative design. The chapter has tried to characterise how innovative it is, to map what accountability phenomena derive from this design and to identify the functions it is expected to play. Its special burden of expert-based impartiality in the face of the polarised politics of climate change has led to a geopolitically balanced composition of the CCKP and to incrementally more intricate decision-making procedures. The extent to which these features, which are very much in tune with the GAL principles, are able to promote such an institutional "feat of self-legitimation",<sup>770</sup> is a question that needs to be continuously raised and candidly taken into consideration.

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<sup>769</sup> Henkin, 1979, 47. See also Zürn and Joerges, 2005, xiii.

<sup>770</sup> To borrow an expression from Walker. (2010a, 22)

## Chapter 6

### The Clean Development Mechanism (CDM): holding finance to account

#### 1. Introduction

The Clean Development Mechanism (CDM) is a financial instrument that sets up a market between developed and developing countries in order to nourish and catalyse the overall global reduction of greenhouse gases (GHGs) emissions.<sup>771</sup> The former actors are the hosts of climate-friendly projects<sup>772</sup> that generate specific credits – the Certified Emissions Reductions (CERs), whereas the latter actors are the buyers of these credits in order to comply with their commitments to curtail or limit their emissions under the Kyoto Protocol.<sup>773</sup> In other words, the amount of emission reductions that take place in developing countries as a consequence of greener projects is translated into tradable CERs, which are then bought and used to offset developed countries' own emissions. This market is believed to work both ways: for developed countries, as a tool for cost-effective compliance with their Kyoto Protocol commitments; and for developing countries, as a trigger to their sustainable development.<sup>774</sup>

Such sketchy picture hides a complex structure and a multitude of actors that are essential to the functioning of this global carbon market. There are three pivotal actors for the operation of this legal mechanism: the Executive Board (EB), which is the treaty-body that regulates the CDM; the Designated Operational Entities (DOEs), which are private legal entities in charge of monitoring and auditing functions; and project participants, who can be either a state-party, or a public or private entity authorised by a state-party to participate as project developer or as buyer of CERs. The architecture of the CDM also

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<sup>771</sup> Kyoto Protocol, art. 12, paragraph 1.

<sup>772</sup> Climate-friendly projects registered by the CDM may range from landfill gas, hydropower, wind power, to the distribution of wood stoves. For an overview, see: <<http://cdm.unfccc.int/Projects/registered.html>> These projects, according to their technical particularities, are categorised in “sectoral scopes” upon which hinge some regulatory implications. See: <<http://cdm.unfccc.int/DOE/list/index.html>>

<sup>773</sup> Kyoto Protocol, art. 12, paragraph 3 (a) and (b).

<sup>774</sup> Kyoto Protocol, art. 12, paragraph 2. On the cost-effectiveness of the mechanism, see Wara, 2008, 1763.

needs to take into account local stakeholders, who are individuals and communities affected, or likely to be affected, by a CDM project in developing countries.

The CDM, therefore, allows non-state actors to take part in this global financial endeavour. This fact has been the object of increasing attention as it departs from traditional patterns of international law, which is usually structured around the rights and obligations of its main protagonist, the nation-states. In that orthodox account, non-state actors would be the addressees of international law only indirectly. International organisations and their supporting bodies would have to rely on states to enact and implement national legislation in order to regulate the behaviour of private actors.<sup>775</sup>

The CDM has a different logic though. The status of non-state actors is directly dependent on the decisions of the EB. DOEs are *accredited* and then *hired* to assist the EB with information regarding CDM projects and to guarantee the soundness of emission reductions. Public and private entities, together with state-parties, and authorised by them, have helped to create a prolific CDM business. They develop and sponsor projects as well as trade the resulting credits.<sup>776</sup> Lastly, local stakeholders, who endure the consequences of each CDM project, are granted some voice in its making, which shall be discussed later.

The participation of non-state actors raises notable questions to my inquiry: does this type of involvement heighten the political sensitivity of the EB decisions? Which are the accountability structures prompted by the mechanism? Are they appropriate to discipline this relationship between the EB and the non-state actors? Are the decision-making procedures sophisticated enough to give voice to all relevant parties and grant them due weight?

Besides the academic interest, there are crucial practical reasons that justify why these questions are worth asking. According to many, some of the

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<sup>775</sup> See Kingsbury, Krisch and Stewart, 2005, 23-24. See also Meijer, 2006-2007, 886-889.

<sup>776</sup> Lin and Streck explain: "Today, an overwhelming majority of the entities trading in the CDM market are private entities. They participate in the market either through investments in funds (for speculative purposes or compliance); through intermediaries; or through direct purchases." (2009, 84) Private companies from developed countries participate as buyers of CERs either because they have to achieve emission cuts (and the European Union's Emissions Trading System is an example of a group of private companies in this situation) or because it is a profitable market. Profit is also the justification for private parties from non-Annex 1 countries to participate as project developers.

CDM features and actors, or the whole mechanism itself, could serve as a model for other emission-trading schemes in a post-2012 climate change regime.<sup>777</sup> This chapter addresses this set of problematic queries. I intend to analyse the CDM governance and to assess the value of recent efforts to strengthen its overall responsiveness. I particularly focus on the role played by DOEs and the EB.

The chapter is structured in three main sections that mirror the sequence of chapters 4 and 5. First, it describes the institutional configuration of the CDM, which encompasses the purpose that this mechanism is supposed to fulfil, the actors that operate it and the various processes through which they interact. The second section explores the accountability structures in which DOEs, the EB and other actors are enmeshed. The last part assesses the appropriateness of these structures for the overall institutional mission of the CDM.

## **2. Institutional configuration**

### ***2.1 Purpose***

The CDM represents one of the most heated topics that has yet to find its way on a post-2012 international climate change agreement. How to financially organise the fight against climate change and to distribute the costs of such enterprise still incites the creativity of institutional architects and political negotiators. To be sure, the puzzle of how financial assistance should be provided in view of global environmental problems is not exclusively related to climate change. In similar situations, like those that demand a comprehensive collective response to environmental risks, the common approach has been to set up mechanisms that allow the flow of investments from developed to developing countries. Such financial tool would have two functions: to attract the

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<sup>777</sup> According to Wara, the CDM has managed to create powerful political institutions and, at the same time, to engage developing countries in a way that is unprecedented in climate change negotiations. (2008, 1763-1764) To Green, the analysis of the CDM is important because many national and sub-national emission's trading schemes are already using the same DOEs for monitoring activities. (2008, 23) Finally, Werksman and Herbertson remind that the CDM has developed procedures that conform to the concept of measuring, reporting and verifying (MRV), such as the responsibility of the EB to approve baselines and to certify emission reductions. (2010, 131)

participation of developing countries, and to provide them with technical and financial capacity to comply with their (new) environmental commitments.<sup>778</sup>

The success of a future climate change agreement is dependent, as observed since the Copenhagen negotiation rounds, upon achieving a consensus with regards to cost-effective mechanisms to curb emissions and to provide funding to developing countries for mitigation and adaptation projects.<sup>779</sup> Such goals, however, have expectedly proved to be quite controversial. On the one hand, developed countries, due to their early industrial expansion, bear the historical responsibility for the level of GHGs concentration in the atmosphere. However that may be, they cannot, or do not want to pay for that costly bill alone.<sup>780</sup> On the other hand, developing countries will be responsible for 55% of the global GHGs emissions by the year of 2025.<sup>781</sup> Yet, they argue that it is against any sense of fairness to slow down their own economic development if they have to retrench their emissions in favour of the international community.

The Climate Change Regime has created a web of funds, trusts and other instruments to buttress mitigation and adaptation activities. Let me contextualise the particular type of finance provided by the CDM in contrast to other financial structures created by the FCCC. This contrast highlights CDM's unique feature – the trading of emission credits – as opposed to conventional donations or direct aid transfers from the rich to the poor.

The FCCC declares that developed countries have financial commitments towards developing countries in order to help the latter to comply with their newly established obligations. Such financial assistance should be “new and additional”<sup>782</sup> and it “shall take into account the need for adequacy and predictability in the flow of funds and the importance of appropriate burden sharing among the developed country Parties”.<sup>783</sup> The Global Environmental Facility (GEF) was, from the beginning, the entity entitled to oversee, under the

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<sup>778</sup> Werksman, 2009, 190.

<sup>779</sup> Copenhagen Accord, paragraphs 7 and 8.

<sup>780</sup> There is an extensive bibliography that addresses the responsibility of developed countries. For a minimal overview, see Chang (2002).

<sup>781</sup> Baumert, Herzog and Pershin, 2005, 17.

<sup>782</sup> FCCC, art. 4.3.

<sup>783</sup> FCCC, art. 4.3.



guidance of the COP, the financial arrangements established under the FCCC.<sup>784</sup> The GEF manages two climate related funds: the Special Climate Change Fund (SCCF),<sup>785</sup> and the Least Developed Countries Fund (LDCF).<sup>786</sup> Additionally, there is the Adaptation Fund (AF), supervised by the Adaptation Fund Board (AFB),<sup>787</sup> which finances projects and programmes in developing countries with a view of adapting to the unavoidable effects of climate change.<sup>788</sup> Developed countries are invited to contribute to the first two funds,<sup>789</sup> while the AF is financed from “the share of proceeds on the clean development mechanism project activities”.<sup>790</sup> The recently created Green Climate Fund (GCF) has prompted some excitement because of the additional resources it pledges.<sup>791</sup> Although the GCF is still in its initial stages, the parties to the FCCC have already agreed on a broad governing instrument that should start operating in the near future.<sup>792</sup>

As for the Kyoto Protocol and its internal logic of emission reductions, a different approach was established in order to foment financing. Faced with the

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<sup>784</sup> See Decision 12/CP.2, Memorandum of Understanding between the Conference of the Parties and the Council of the Global Environment Facility.

<sup>785</sup> Decision 7/CP.7. This fund has a complementary character and it focuses on providing funds for adaptation, transfer of technologies, and energy, transport, industry, agriculture, forestry and waste management; See paragraph 2 (a); (b); (c) from Decision 7/CP.7.

<sup>786</sup> Decision 7/CP.7. According to Decision 27/CP.7, paragraph 1, the fund should “support the work programme for the least developed countries, including, inter alia, the preparation and implementation of national adaptation programmes of action (NAPAs)”. The GEF website indicates that the fund has mobilised more than half a billion dollars. At: <http://www.thegef.org/gef/LDCF>

<sup>787</sup> Created under Decision 1/CMP.3, paragraph 3.

<sup>788</sup> Decision 10/CP.7, paragraph 1.

<sup>789</sup> Decision 7/CP.7, paragraph 1 (c).

<sup>790</sup> Decision 10/CP.7, paragraph 2.

<sup>791</sup> Decision 1/CP.16, paragraph 102. The Green Climate Fund was first mentioned in the Copenhagen Accord and its promise is to mobilise part of the amount of USD 30 billion to 100 billion pledged by developed countries. As declared by the Accord: “The collective commitment by developed countries is to provide new and additional resources, including forestry and investments through international institutions, approaching USD 30 billion for the period 2010–2012 with balanced allocation between adaptation and mitigation. Funding for adaptation will be prioritized for the most vulnerable developing countries, such as the least developed countries, small islands, developing States and Africa. In the context of meaningful mitigation actions and transparency on implementation, developed countries commit to a goal of mobilizing jointly USD 100 billion dollars a year by 2020 to address the needs of developing countries. This funding will come from a wide variety of sources, public and private, bilateral and multilateral, including alternative sources of finance. New multilateral funding for adaptation will be delivered through effective and efficient fund arrangements, with a governance structure providing for equal representation of developed and developing countries. A significant portion of such funding should flow through the Copenhagen Green Climate Fund.” (Copenhagen Accord, paragraph 8)

<sup>792</sup> Decision 3/CP.17, Annex, Governing Instrument for the Green Climate Fund.

binding commitments to limit or reduce their GHGs emissions,<sup>793</sup> Annex I countries were given the possibility to meet these obligations in a cost-effective way through three market-based mechanisms: Emissions Trading, Clean Development Mechanism and Joint Implementation.

The establishment of such market-mechanisms implies that environmental problems in general, and climate change specifically, yield to “economic reasoning”.<sup>794</sup> In other words, it assumes that such challenges should be faced by measures of market-oriented economic policies. Such measures shape individual behaviour, as well as structure market forces “to work *for* rather than *against* environmental protection”.<sup>795</sup>

The CDM is considered, among these market mechanisms, the most important and successful one.<sup>796</sup> Its official intention is twofold: “to assist Parties not included in Annex I in achieving sustainable development” and “to assist Parties included in Annex I in achieving compliance with their quantified emission limitation and reduction commitments”.<sup>797</sup> As for the first objective, apart from channelling the financial flow from developed to developing countries,<sup>798</sup> the CDM enables the awaited participation of developing countries in the collective effort to reduce global GHGs emissions.<sup>799</sup> The second objective suggests that developed countries have a higher incentive to comply with their emission reductions because the overall cost to do so through a project based in a developing country is much lower than it would otherwise be in their own national boundaries.<sup>800</sup>

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<sup>793</sup> Kyoto Protocol, art. 3, paragraph 1.

<sup>794</sup> Expression used by Keohane and Olmstead, 2007, 2.

<sup>795</sup> Keohane and Olmstead, 2007, 2.

<sup>796</sup> “The CDM occupies a unique space in international carbon markets. It is by far the largest international offset mechanism and enjoys broad support from developed and developing countries alike. Operational since 2001, it has more than 4,400 registered projects in 76 developing countries and has generated approximately one billion credits, which can be traded and used by developed countries to offset their emissions and to support meeting their mitigation targets.” (Report of the High-Level Panel on the CDM Policy Dialogue, 2012, 17)

<sup>797</sup> Kyoto Protocol, art. 12, paragraph 2.

<sup>798</sup> Barker et al., 2007, 91.

<sup>799</sup> Wara, 2008, 1764. Some like Prouty (2009), however, challenge this objective because, arguably, only the richest among developing countries (like Brazil, India and China) would be able to attract profitable projects.

<sup>800</sup> Wara, 2008, 1763.

Whether and to what extent the CDM has succeeded in achieving these goals, according to the opinion of analysts, will be described later. First, I depict the actors of the CDM and what the processes through which they interact are.

## ***2.2 Actors***

As already contended, the operation of the CDM comprises state and non-state actors. In this sub-section, I identify these key actors and describe the task each one is assigned within the CDM. The actors are the COP/MOP, the EB, the DOEs, the Designated National Authority (DNA), the project participants, and local stakeholders.

The ultimate source of authority and guidance to the CDM is the COP/MOP, the body that convenes the parties that have ratified the Kyoto Protocol.<sup>801</sup> The COP/MOP triggers the dynamics of the protocol through the adoption of procedures, rules and guidelines, as well as through the creation of subsidiary bodies. The COP/MOP implemented the CDM through the Decision 3/CMP.1, which is called the “Modalities and Procedures for a Clean Development Mechanism”.<sup>802</sup>

The second vital body is the EB, which supervises the day-to-day activities of the mechanism.<sup>803</sup> The EB is competent to decide the fate of every CDM project. Its decisions, therefore, have a direct impact on the investments made by project participants. It approves methodologies, registers CDM projects, and issues CERs. The EB also determines whether and which private companies can be accredited as DOEs. The nature of the powers of the EB has prompted some authors to compare it to domestic administrative agencies.<sup>804</sup> When referring to its own competence, the EB recognises its “rule-making and

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<sup>801</sup> Kyoto Protocol, art. 12 (4).

<sup>802</sup> Kyoto Protocol, art 12 (7) determines the implementation of the CDM: “The Conference of the Parties serving as the meeting of the Parties to this Protocol shall, at its first session, elaborate modalities and procedures with the objective of ensuring transparency, efficiency and accountability through independent auditing and verification of project activities.”

<sup>803</sup> Kyoto Protocol, Article 12 (4).

<sup>804</sup> Stewart realised that a comparison between domestic agencies and the EB was feasible and illuminating. He contends that the EB engages in real rulemaking and adjudicative administrative decisions. (2005a, 91) Meijer also equates the decisions of the EB to domestic administrative decisions and believes that the decisions of the COP/MOP may sometimes fall within this category. (2006-2007, 890)

rule-enforcing roles”, and further categorises the nature of its decisions as pertaining to the domain of regulation, rule-making, and of an administrative kind.<sup>805</sup>

The EB is composed of ten members and ten alternate members.<sup>806</sup> These members act in their personal capacity and are chosen for their technical and/or policy expertise in the range of subjects that are dealt with by the EB.<sup>807</sup> They should not have “pecuniary or financial interest in any aspect of a CDM project activity or any designated operational entity”.<sup>808</sup> Consensus is the standard working mode of the EB. However, as a last resort decisional rule, “a three-fourths majority of the members present and voting at the meeting” are able to take a decision.<sup>809</sup>

In order to accomplish its functions, the EB is allowed to establish committees, panels, and working groups.<sup>810</sup> The EB has availed itself of such possibility by instituting a number of specialised bodies. Among these bodies, the Accreditation Panel (CDM-AP) is responsible to advise the EB about accreditation matters of DOEs.<sup>811</sup> The CDM-AP, in turn, is supported by the work of ad-hoc assessment teams (CDM-AT).<sup>812</sup> The Registration and Issuance Team (RIT) assists the EB in considering the requests for registration and issuance of CERs submitted by DOEs.<sup>813</sup> The members of the RIT are not attached to any state party. They are experts chosen by the EB through a “public call for experts”. The composition of the team, in any event, should respect a

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<sup>805</sup> “CDM Executive Board Decision Framework: Decision Hierarchy, Document Types and Control of Documentation issued by the Board”, (Version 03.2), 61<sup>st</sup> meeting of the EB 61, Annex 25, paragraph 5 (a), (b), (c).

<sup>806</sup> This composition must be balanced in accordance with the following equation: “one member from each of the five United Nations regional groups, two other members from the Parties included in Annex I, two other members not included in Annex I, and one representative of the small island developing States”. See Decision 3/CMP.1, 7 and 9.

<sup>807</sup> Decision 3/CMP.1, paragraph 8 (c).

<sup>808</sup> Decision 3/CMP.1, paragraph 8 (f).

<sup>809</sup> Decision 3/CMP.1, paragraph 15.

<sup>810</sup> Decision 3/CMP.1, Annex, paragraph 18. Decision 4/CMP.1, Annex 1, Rule 32.

<sup>811</sup> 3<sup>rd</sup> Meeting of the EB, Report, Annex 1, paragraph 4 (a), (b), (c), (d). See 67<sup>th</sup> Meeting of the EB, Report, Annex 3, “Terms of Reference of the Support Structure of the CDM Executive Board”, (Version 02.0), paragraph 5, (a), (b), and (c).

<sup>812</sup> 9<sup>th</sup> Meeting of the EB, Report, Annex 1, paragraph 5.

<sup>813</sup> 67<sup>th</sup> Meeting of the EB, Report, Annex 2, “Terms of Reference for the Registration and Issuance Team, paragraph 1.

regional balance.<sup>814</sup> Finally, the Secretariat of the FCCC provides the institutional and technical support for the EB and its specialised bodies.<sup>815</sup>

DOEs are the next crucial actors of the CDM. They are private legal entities, either domestic or international,<sup>816</sup> which will be evaluated by the EB and ultimately by the COP/MOP in order to perform the monitoring functions within the CDM cycle. DOEs validate projects, verify and certify the promised emission reductions, and requests the EB to issue the equivalent amount of CERs.<sup>817</sup> DOEs are hired by project participants<sup>818</sup> and are “accountable to the COP/MOP through the Executive Board”.<sup>819</sup>

The Designated National Authority (DNA) is the national body established by each state-party to the Kyoto Protocol,<sup>820</sup> which must approve the participation in a CDM project. The DNAs from developing countries, in particular, have a specific task: they have to confirm whether the CDM project helps the country to achieve a sustainable development.<sup>821</sup>

A project participant is defined as a party that “intends to participate, or a private and/or public entity authorized by the DNA of a Party involved to participate in a CDM project”.<sup>822</sup> Private and public entities can only participate in a CDM project activity if a Party to the Kyoto Protocol, through their DNAs, ensures their compliance with CDM procedures.<sup>823</sup>

Finally, local stakeholders are “the public, including individuals, groups or communities affected, or likely to be affected, by the proposed clean development mechanism project activity”.<sup>824</sup> Local stakeholders have the opportunity to comment on the CDM project at the earliest stage of its conception. These comments should be taken into account, together with the

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<sup>814</sup> 59<sup>th</sup> meeting of the Executive Board, Annex 13, paragraph 11.

<sup>815</sup> Kyoto Protocol, art. 14. See 67<sup>th</sup> Meeting of the EB, Report, Annex 3, “Terms of Reference of the Support Structure of the CDM Executive Board”, (Version 02.0), paragraphs 7 and 8.

<sup>816</sup> See Decision 3/CMP.1, Appendix A, “Standards for the accreditation of operational entities”, 1 (a).

<sup>817</sup> See Decision 3/CMP.1, Appendix A, “Standards for the accreditation of operational entities”.

<sup>818</sup> Decision 3/CMP.1, Annex, paragraph 37 “the designated operational entity selected by project participants to validate a project activity, being under contractual arrangement with them (...)”.

<sup>819</sup> Decision 3/CMP.1, Annex, paragraph 26.

<sup>820</sup> Decision 3/CMP.1, Annex, paragraph 29.

<sup>821</sup> Decision 3/CMP.1, Annex, paragraph 40 (a).

<sup>822</sup> 66<sup>th</sup> meeting of the EB, Annex 63, “Glossary of CDM terms”, (Version 06).

<sup>823</sup> Decision 3/CMP.1, Annex, paragraph 33.

<sup>824</sup> Decision 3/CMP.1, Annex, Definitions, paragraph 1 (e).

technical description of the project, before the project is duly registered by the EB.<sup>825</sup>

### ***2.3 Process***

There are distinct yet interconnected processes within the CDM institutional architecture. I will describe them separately. First, one needs to observe how a private legal entity can be accredited a DOE status and keep such status over time. Second, once DOEs are officially constituted within the CDM system, one should be attentive to the CDM cycle itself, that is, how climate-friendly projects in developing countries can be issued the correspondent CERs. Third, a set of surrounding procedures adds a further layer of complexity to the interaction between the EB, the DOEs and other actors.

#### ***2.3.1 Becoming and remaining a DOE: accreditation and reaccreditation***

Any legal entity willing to be assigned a DOE formal status must undergo the cumbersome process of accreditation. In order to keep its status, moreover, a DOE is periodically subject to a reaccreditation process, and may occasionally face sanctions of withdrawal and suspension. All these processes are oriented by procedural, economic and technical standards, which are explained below.

The CDM-AT has the task of verifying whether the applicant entity (the potential DOE) meets all the accreditation standards. Such standards relate to the general competence to perform the CDM monitoring activities,<sup>826</sup> the existence of “sufficient arrangements to cover legal and financial liabilities arising from its activities”,<sup>827</sup> and the absence of any pending judicial proceedings for

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<sup>825</sup> Decision 3/CMP.1, Appendix B, Project design document, 2 (g).

<sup>826</sup> Decision 3/CMP.1, Appendix A, “Standards for the accreditation of operational entities”, 1 (b).

<sup>827</sup> Decision 3/CMP.1, Appendix A, “Standards for the accreditation of operational entities”, 1 (d). This is a serious requirement. If a DOE is found to have caused issuance of CERs in excess, it might be compelled to “acquire and transfer (...) an amount of carbon dioxide equivalent equal to the excess CERs issued”. Decision 3/CMP.1, Annex, paragraph 22.

malpractice or fraud.<sup>828</sup> The verification of whether the applicant entity meets those standards requires the CDM assessment team (CDM-AT) to conduct on-site assessments and to witness the execution of activities.<sup>829</sup> The CDM-AT reports its findings to the CDM accreditation panel (CDM-AP), which prepares the final recommendation of the applicant to the EB.<sup>830</sup>

The scrutiny by the EB and the CDM-AP over the DOEs does not end with the act of accreditation. DOEs are also bound by a series of routine controls. Every three years, DOEs have to go through reaccreditation to ensure they still comply with the up-to-date accreditation requirements. Apart from that, a third specialised body, the RIT, is in charge of permanently checking whether the validation, verification and certification requirements “have been appropriately dealt with by the DOE”.<sup>831</sup> Finally, at any time, DOEs can also be “spotted-checked” by the EB.<sup>832</sup>

It is very important for a DOE to prove its impartial position when performing its tasks.<sup>833</sup> In this sense, DOEs must demonstrate that they do not have real or potential conflict of interest in a CDM project.<sup>834</sup> They have to submit annual reports of their activities to the EB<sup>835</sup> and always make publicly available the information obtained from project participants.<sup>836</sup>

DOEs have to abide by the “Validation and Verification Manual”, which contains a detailed guidance on how they should perform their validation and verification roles, how to deal with project participants, what method should be used to assess the documents it receives, and the principles that should direct their work – namely, transparency, independence, impartiality and consistency. The manual, in other words, aims at standardising the conduct of DOEs, at assuring the integrity and fairness of how they treat project participants. It

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<sup>828</sup> Decision 3/CMP.1, Appendix A, “Standards for the accreditation of operational entities”, 1 (h).

<sup>829</sup> 56<sup>th</sup> Meeting of the Executive Board, Annex 2, paragraph 4.

<sup>830</sup> 56<sup>th</sup> Meeting of the Executive Board, Annex 2, paragraph 13 (f).

<sup>831</sup> 59<sup>th</sup> meeting of the Executive Board, Annex 13, paragraph 3 (a) and (b).

<sup>832</sup> See Decision 3/CMP.1, Annex, paragraph 20 (d) and (e). The possibility of spotted-checks is conferred upon the EB on a discretionary basis, to be exercised at any time. For an exemplary enumeration of hypotheses, see 56<sup>th</sup> Meeting of the Executive Board, Annex 2, paragraphs 117 to 135.

<sup>833</sup> See an implementation of the principle on “CDM Accreditation Standards for Operational Entities (Version 03)”, 62<sup>nd</sup> Meeting of the Executive Board, Annex 1, paragraphs 145 and 146.

<sup>834</sup> Decision 3/CMP.1, Annex, paragraph 27 (d).

<sup>835</sup> Decision 3/CMP.1, Annex, paragraph 27 (g).

<sup>836</sup> Decision 3/CMP.1, Annex, paragraph 27 (h).

indicates, at the same time, the benchmark through which their acts can be judged.<sup>837</sup>

Project participants and stakeholders are entitled to bring complaints against DOEs. Both actors, thus, also integrate the web of constraints faced by DOEs. A committee, created within the Secretariat, will carry out the initial examination of such complaints. If the committee considers that a complaint is “substantiated”, the DOE has a right of response.<sup>838</sup> Based on the information received from all parties involved, the Secretariat prepares an assessment report about the facts investigated.<sup>839</sup> The CDM-AP has the last word on whether such complaint will succeed and lead to a sanction.<sup>840</sup>

DOEs can be penalised with suspension or withdrawal of their designation as an operational entity.<sup>841</sup> These hard consequences, however, cannot be implemented without DOEs being granted the right to be heard and, in case of decisions of suspension, without precise time limits to implement corrective or remedial actions.<sup>842</sup>

Furthermore, applicant entities and DOEs have the opportunity to appeal against any adverse recommendation from the CDM-AP that affects or constitutes an obstacle against obtaining, maintaining, or extending their accreditation status.<sup>843</sup> An *ad hoc* appeal panel is then formed within the EB to evaluate the arguments of the appeal and, if that is the case, to recommend a decision to be taken by the EB.<sup>844</sup> The EB has the last word at the appeal level.<sup>845</sup>

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<sup>837</sup> 55<sup>th</sup> meeting of the Executive Board, Annex 1, “Clean Development Mechanism Validation and Verification Manual” (Version 01.2).

<sup>838</sup> 56<sup>th</sup> meeting of the Executive Board, Annex 2, Appendix 3, paragraph 8.

<sup>839</sup> 56<sup>th</sup> meeting of the Executive Board, Annex 2, Appendix 3, paragraph 10.

<sup>840</sup> 56<sup>th</sup> meeting of the Executive Board, Annex 2, Appendix 3, paragraph 15.

<sup>841</sup> Decision 3/CMP.1, Annex, paragraph 21.

<sup>842</sup> 56<sup>th</sup> meeting of the Executive Board, Annex 2, paragraphs 154 and 155 (b). At its 53<sup>rd</sup> meeting, the EB suspended one DOE, and partially suspended other, following the recommendation of the CDM-AP. (53<sup>rd</sup> meeting of the EB, Report, 26 March 2010, paragraphs 8 and 10)

<sup>843</sup> 56<sup>th</sup> meeting of the Executive Board, Annex 2, Appendix 2, paragraph 2 (a) and (b).

<sup>844</sup> 56<sup>th</sup> meeting of the Executive Board, Annex 2, Appendix 2, paragraph 9.

<sup>845</sup> 56<sup>th</sup> meeting of the Executive Board, Annex 2, Appendix 2, paragraph 13.



### 2.3.2 CDM cycle: the path towards the issuance of CERs

A CDM project, from its conception to the generation of CERs, goes through four specific phases: (i) validation, (ii) registration, (iii) verification and certification, and (iv) issuance of CERs.

The outset of the CDM process is the Project Design Document (PDD), which is prepared by aspiring project participants. The PDD contains a detailed technical description of the future project.<sup>846</sup> It must also incorporate the comments of stakeholders and show that “due account” was taken of them.<sup>847</sup> The PDD needs to be accompanied by the previous approval of a DNA from the country that hosts the climate-friendly project. In case there are project participants from Annex I countries, they would also need the approval from their respective DNAs.<sup>848</sup>

The PDD is remitted to a DOE for *validation*. In this phase, the DOE attests whether the project has fulfilled all the requirements of the CDM. Among these requirements, the DOE has to attest whether the comments of stakeholders were duly contemplated by the project proponent, and whether the project activity is likely to truly reduce emissions that are additional to any that would occur in the absence of the proposed activity.<sup>849</sup> A validation report is submitted to the EB, which has to ponder over whether the proposal can be *registered* as a “CDM project activity”.<sup>850</sup>

Once the project is registered and fully operative, it is time for a DOE to *verify* and *certify* the actual emission reductions from the project. Such DOE should be different from the DOE that has validated the project in the first place, because of potential conflicts of interests that would affect its impartiality.<sup>851</sup> At

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<sup>846</sup> See the content of the PDD in Decision 3/CMP.1, Appendix B, Project Design Document, paragraph 2.

<sup>847</sup> Decision 3/CMP.1, Appendix B, Project design document, 2 (g).

<sup>848</sup> Decision 3/CMP.1, Annex, paragraph 40 (a).

<sup>849</sup> Decision 3/CMP.1, Annex, paragraph 35 and 37 (a)-(g). The functions of a DOE are generally described in 3/CMP.1, Annex, paragraph 27.

<sup>850</sup> Decision 3/CMP.1, Annex, paragraph 36.

<sup>851</sup> This general rule should be followed unless otherwise stated by the EB. Decision 3/CMP.1, Annex, paragraph 27(e). Green contends that the separation between, on the one hand, validation and, on the other, verification and certification occurs to avoid potential conflict of interests between the two functions. However, according to her, such separation is not always possible because of the small number of DOEs to perform such activities in the sectoral scope they have been accredited. (2008, 35-36 and 49)

this stage, the DOE checks whether the latest documentation provided by project participants is compatible with the CDM project that was initially registered. In order to perform its assigned function at this point, the DOE might conduct on-site inspections, review the data records and the monitoring methodology, and interview project participants and local stakeholders.<sup>852</sup> The crucial task for a DOE is to determine with reliability whether the project has actually resulted in lower levels of GHGs emissions, that is, whether it has fulfilled the additionality targets.<sup>853</sup> Following the verification and certification phase, a report must be forwarded to the EB. Such report amounts to a request for the issuance of CERs. The final phase is the actual *issuance of CERs* by the EB, which should be “equal to the verified amount of reductions of anthropogenic emissions by sources of greenhouse gases”.<sup>854</sup>

The registration and issuance of CERs might be delayed if the party involved, or at least three members of the EB, request a review either of the proposed project or of the issuance of CERs. The scope of the former review is related to validation requirements, whereas the scope of the latter is “limited to issues of fraud, malfeasance or incompetence of designated operational entities”.<sup>855</sup>

In both types of review, the status of project activities and of DOEs can be affected by a final decision on the matter. New procedures were enacted in 2010 and 2011, respectively, with the intention to provide DOEs and project participants with adequate time to address the queries raised in the review and to include a better technical assessment of the matter.<sup>856</sup> Two expert teams – one formed within the Secretariat and the other within the RIT – are instituted to work “concurrently and independently” in the assessment of the crucial points raised by the review. They need to take into account the answers of project

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<sup>852</sup> Decision 3/CMP.1, Annex, paragraph 62 (a)-(h).

<sup>853</sup> Decision 3/CMP.1, Annex, paragraph 62 (f).

<sup>854</sup> Decision 3/CMP.1, Annex, paragraph 64.

<sup>855</sup> Decision 3/CMP.1, Annex, paragraphs 41 and 65, respectively.

<sup>856</sup> Decision 2/CMP.5, paragraphs 38 and 39 revoked the previous procedures for review and asked for a revision of the procedures. These new procedures are described in: 55<sup>th</sup> meeting of the Executive Board, Annex 40, “Procedures for Review of Requests for Registration” Version (01.2) (30<sup>th</sup> July, 2010). 64<sup>th</sup> Meeting of the EB, Annex 4, “Procedures for Review of Requests for Issuance of CERs”, Version 2.0 (26<sup>th</sup> October, 2011).

participants and of DOEs, and have to give “reasons and rationale” for any decision or objection made throughout the process.<sup>857</sup>

The decisions of the EB with respect to registration and issuance of CERs are final and do not allow any type of redress. In 2010, the COP/MOP requested the EB to design an appeal procedure against decisions of the EB involving “the rejection or alteration of requests for registration or issuance”.<sup>858</sup> The COP/MOP categorically demanded the EB to focus on due process when drafting such appeal device.<sup>859</sup> In order to collect ideas from stakeholders about the makeup of this appeal mechanism, the EB set in motion a “call for inputs”, a new device to be explained below. The issue is not uncontroversial. One example of impasse relates to the scope of the appeal: whether the mechanism should only be triggered vis-à-vis negative decisions of the EB or whether it should also include positive decisions of the EB.<sup>860</sup> As of the time of this writing, however, negotiations are still on hold about its final architecture.

### ***2.3.3 Ancillary procedures***

The COP/MOP established a set of rules to guide the EB. These rules highlight the importance of transparency, public participation and openness.<sup>861</sup> According to these rules, transparency is a principle that needs to inform every aspect of the EB work, and includes the public availability of documentation and open channels of communication between all interested actors.<sup>862</sup> The meetings of the EB, in turn, should happen under the scrutiny of the public.<sup>863</sup> The EB is only allowed to limit attendance as a consequence of weighing up the importance of other interests, such as “economy and efficiency”.<sup>864</sup> In these limited circumstances, the EB should find, as defined by proper rules of

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<sup>857</sup> 55<sup>th</sup> meeting of the Executive Board, Annex 40, “Procedures for Review of Requests for Registration” Version (01.2), paragraphs (12), (13), (16), (21), (27),

64<sup>th</sup> Meeting of the EB, Annex 4, “Procedures for Review of Requests for Issuance of CERs”, Version 2.0, paragraphs (12), (13), (16), (21), (28).

<sup>858</sup> Decision 2/CMP.5, paragraph 42 (b).

<sup>859</sup> Decision 2/CMP.5, paragraph 43.

<sup>860</sup> Synthesis Report of the call for input on the CDM policy dialogue, paragraph 13.

<sup>861</sup> Decision 4/CMP.1, Annex 1, “Rules of Procedure of the Executive Board of the Clean Development Mechanism”, (March 30<sup>th</sup>, 2006), FCCC/KP/CMP/2005/8/Add.1.

<sup>862</sup> Decision 4/CMP.1, Annex 1, Rule 26.

<sup>863</sup> Decision 4/CMP.1, Annex 1, Rule 27 (1).

<sup>864</sup> Decision 4/CMP.1, Annex 1, Rule 27 (2).

procedure, “other ways” to accommodate the interests of those willing to be observers or watchdogs.<sup>865</sup>

In addition to these rules, the rhetoric of the EB reveals a constant concern with transparency issues and with a serious engagement with stakeholders. In the 2009 Annual Report to the COP/MOP, the EB recognised transparency as a “key priority”<sup>866</sup> and detailed measures to address the perceived lack of reasoning of its decisions.<sup>867</sup> The 2011 Annual Report acknowledges the importance of ameliorating its rules regarding the comments of stakeholders.<sup>868</sup>

Beyond rhetoric, some concrete tools reveal how the EB faces its commitments to achieve transparency and a better engagement with stakeholders. In 2011, the EB launched the “Modalities and Procedures for Direct Communication with Stakeholders”.<sup>869</sup> Such document is the result of a campaign, initiated by the COP/MOP, to enhance the communication with project participants and stakeholders.<sup>870</sup> The goals of the document are fourfold: to enhance the regulatory functions of the EB; to obtain the latest information from stakeholders; to improve stakeholders’ understanding of the CDM rules; and to ensure transparency.<sup>871</sup> Within this general code of procedures, three mechanisms are worth a further scrutiny. Two of them are related to the policy-making function of the EB and the other to case-specific issues.

The first is the procedure identified as “call for inputs”.<sup>872</sup> This procedure aims at gathering public commentaries on any revised or new regulatory document that may be of importance for project participants, DOEs and

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<sup>865</sup> Decision 4/CMP.1, Annex 1, Rule 27 (2).

<sup>866</sup> 2009 Annual Report of the Executive Board of the clean development mechanism to the Conference of the Parties serving as the meeting of the Parties to the Kyoto Protocol, (November 4<sup>th</sup>, 2009), Doc. n. FCCC/KP/CMP/2009/16, paragraph 23.

<sup>867</sup> 2009 Annual Report of the Executive Board of the clean development mechanism to the Conference of the Parties serving as the meeting of the Parties to the Kyoto Protocol, (November 4<sup>th</sup>, 2009), Doc. n. FCCC/KP/CMP/2009/16, paragraph 115.

<sup>868</sup> 2011 Annual report of the Executive Board of the clean development mechanism to the Conference of the Parties serving as the meeting of the Parties to the Kyoto Protocol (November, 17<sup>th</sup>, 2011), FCCC/KP/CMP/2011/3, paragraph 29.

<sup>869</sup> 62<sup>nd</sup> Meeting of the Executive Board, Annex 15, July 15<sup>th</sup> 2011, “Modalities and Procedures for Direct Communication with Stakeholders” (Version 01).

<sup>870</sup> Decision 2/CMP.5, paragraph 8, (March 30<sup>th</sup> 2010), FCCC/KP/CMP/2009/21/Add.1, and Decision 3/CMP.6, paragraph 22, (March 15<sup>th</sup> 2011), FCCC/KP/CMP/2010/12/Add.2.

<sup>871</sup> 62<sup>nd</sup> Meeting of the Executive Board, Annex 15, paragraph 7 (a), (b), (c), and (d).

<sup>872</sup> This is not a new mechanism to the CDM and it has been extensively used by the EB.

DNAs.<sup>873</sup> The EB has the duty to take into consideration the inputs received and to publicise a summary of them.<sup>874</sup> If appropriate, the EB should justify its decision when it deviates from the proposals of stakeholders.<sup>875</sup>

The second mechanism is the “communication initiated by stakeholders”, which is an open channel to DOEs, DNAs and project participants to trigger a direct communication with the EB about policy-related issues. These actors can publicly express their views on CDM rules and request further clarification from the EB.<sup>876</sup> The EB is required to respond to communications and to make the documents publicly available.<sup>877</sup>

The third device is the “communication of case-specific issues”, which gives the CDM actors and the Secretariat, on behalf of the EB, a leeway to communicate with each other about the processing of specific-cases (like, for example, accreditation matters).<sup>878</sup> DOEs and project participants are entitled to respond and to clarify, via this instrument, some issues raised by the Secretariat.<sup>879</sup> Such device does not allow DOEs and project participants to challenge any concrete decision. It still keeps, however, a useful channel for mutual engagement and regulatory improvement.<sup>880</sup>

Finally, the EB has also introduced the “policy dialogue”. The purpose of this “policy dialogue” is to assess the past experience of the CDM in order to make proposals for the future of the mechanism.<sup>881</sup> The “policy dialogue” consists of a panel composed by twelve members from civil society, policymakers and the market.<sup>882</sup> The members of the panel have to prepare a report to the EB and to the COP/MOP with suggestions and criticisms about the CDM. How to address new challenges and how to ensure effectiveness in the struggle against climate change are issues to be included in the report.<sup>883</sup> The

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<sup>873</sup> 62<sup>nd</sup> Meeting of the Executive Board, Annex 15, paragraph 27.

<sup>874</sup> 62<sup>nd</sup> Meeting of the Executive Board, Annex 15, paragraphs 30 and 31.

<sup>875</sup> 62<sup>nd</sup> Meeting of the Executive Board, Annex 15, paragraph 31.

<sup>876</sup> 62<sup>nd</sup> Meeting of the Executive Board, Annex 15, paragraph 40 (a) and (b).

<sup>877</sup> 62<sup>nd</sup> Meeting of the Executive Board, Annex 15, paragraphs 41 and 42.

<sup>878</sup> 62<sup>nd</sup> Meeting of the Executive Board, Annex 15, paragraph 57.

<sup>879</sup> 62<sup>nd</sup> Meeting of the Executive Board, Annex 15, paragraph 59 (c).

<sup>880</sup> 62<sup>nd</sup> Meeting of the EB, Annex 15, paragraph 59 (d).

<sup>881</sup> 63<sup>rd</sup> meeting of the EB, September 29<sup>th</sup> 2011, paragraph 8(d).

<sup>882</sup> 64<sup>th</sup> meeting of the EB, Annex 1, Terms of Reference for the Policy Dialogue on the Clean Development Mechanism (Version 01.0), paragraph 6.

<sup>883</sup> 64<sup>th</sup> meeting of the EB, Annex 1, Terms of Reference for the Policy Dialogue on the Clean Development Mechanism (Version 01.0), paragraph 6.

panel works independently from the political structure of the CDM,<sup>884</sup> although it can use the existing infrastructure (like the Secretariat), or even create new working groups, in order to fulfil its objective.<sup>885</sup> The only demand directed towards the work of the panel is that it should rely on inputs from a wide range of representatives, including “governmental, intergovernmental, business, environmental, research and other communities.”<sup>886</sup>

### **3. Accountability structures**

It would be slightly misleading to ask whether and how the CDM, as such, is accountable. Unlike the IPCC and the CCKP, which, internal divisions aside, are themselves organic bodies that take decisions and are held to account as a whole, the CDM is not a single body properly so called. It is rather a financial technique that enrolls various actors who trigger emission reductions as defined by the Kyoto Protocol. Thus, if one is concerned about the accountability of the CDM, one actually needs to specify which are the precise actors that should be scrutinised through such critical lenses.

The mapping of actors and the explanation of how they interact through various processes already enabled us to envision a multitude of accountability relationships. The intensity, formality and desirability of each connection may vary significantly. It is relevant to identify how this accountability chain is shaped. Every actor of this chain, in a more or less visible way, is simultaneously an account-holder and an accountee. This section intends to unpack the main vectors of this chain and reiterate the main processes earlier described through the language of accountability. In other words, it quickly re-reads those interactions in the light of the coordinates that mould an accountability relationship.

The narrative that follows will depict how accountable, in principle, the DOE and the EB are. These are the two entities that have sparked the main

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<sup>884</sup> 64<sup>th</sup> meeting of the EB, Annex 1, Terms of Reference for the Policy Dialogue on the Clean Development Mechanism (Version 01.0), paragraph 3.

<sup>885</sup> 64<sup>th</sup> meeting of the EB, Annex 1, Terms of Reference for the Policy Dialogue on the Clean Development Mechanism (Version 01.0), paragraph 4.

<sup>886</sup> 64<sup>th</sup> meeting of the EB, Annex 1, Terms of Reference for the Policy Dialogue on the Clean Development Mechanism (Version 01.0), paragraph 7.

anxieties about putative accountability deficits in the respective literature about the CDM. How constrained are they to give an account of their acts and decisions? Where do these constraints come from? The *coordinates* of accountability help us to answer these questions. In the fourth section, I will then assess the appropriateness of some of these structures for the general function of the CDM. I remain, for the moment, at a strictly descriptive level.

### ***3.1 The Designated Operational Entities (DOEs)***

The architecture of the CDM assembles a multi-layered delegation belt, a vertical continuum of principal-agent relationships: from state-parties to the COP/MOP; from the COP/MOP to the EB; from the EB to the DOEs. DOEs are key decision-making actors within such edifice and there are several accountability relationships in which they are involved. Three are vital to my analysis: first, that with the EB and its internal specialised bodies (CDM-AP and RIT); second, the one with project participants and local stakeholders; third, with the market generally conceived. In all of them, without necessarily stretching the concept of accountability, one can perceive DOEs occupying the positions of both account-holder and accountee.

DOEs are, first and foremost, accountable to the EB.<sup>887</sup> As it happens with any principal-agent delegation bond, such relationship materialises along a vertical line. The relationship, in each and every aspect from accreditation onwards, is entirely constituted by formal rules that discipline such direct interaction, which takes place without the intermediation of a surrogate. Because there is a straightforward centre of command, this system instantiates a unitary rather than a pluralistic or multilateral mode of accountability, with an unambiguous division of labour and responsibilities. As for the institutionality, the EB holds DOEs to account “as one”, that is, as an autarchic entity irrespective of its individual members. For that same reason, such relationship also configures an “external” accountability, since DOEs are distinct legal entities. The terms of engagement between them, and, in truth, the very language through which DOEs communicate and are assessed is utterly shaped by

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<sup>887</sup> Decision 3/CMP.1, Annex, paragraph 26.

expertise: meeting the requisites of accreditation and exercising the acts of validation and verification demands from them the display of technical proficiency and the actual observance of strict methodologies and baselines for calculating additionality, a competency which the EB is supposed to control meticulously. This interaction is wholly informed by the detailed standards through which the EB can assess the performance of DOEs.<sup>888</sup> Rather than based on judgment and trust, this is a clear compliance-based set of standards.

The interaction between accountee and account-holder, in this case, is highly proceduralised. The ways in which DOEs are appointed, monitored, appraised and sanctioned by the EB follow explicitly codified steps which are, at least in the official rhetoric, qualified by principles of openness, transparency and participation. From the temporal perspective, this accountability friction happens both *ex-ante* and *ex-post*. The accreditation phase is a mechanism of preventive control, a type of “screening” through which the account-holder seeks to eliminate the incentives for the accountees, who are private and profit-seeking agents, to evade their duties<sup>889</sup> At the same time, DOEs are expected to keep its accreditation status intact and are frequently subject to checks by the EB and its specialised bodies. Sanctions may also operate *ex post* when the EB reviews the DOEs’ acts of validation and verification. With regards to the weight of the consequences that might ensue from its performance, DOEs may face the hard sanctions of suspension or withdrawal of their designation as an operational entity.

Project participants and stakeholders also contribute in holding DOEs to account. However ancillary that may be, this creates a more compounded accountability regime than one grasps when looking exclusively towards the interaction between DOEs and the EB. Although project participants and stakeholders do not have the same power to constrain, they contribute to monitor DOEs’ behaviour. DOEs are bound to project participants by means of a contract on the basis of which they will perform validation, verification and certification tasks. Project participants, as well as the members of the EB, have the right to request a review of the proposed project and of the issuance of

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<sup>888</sup> These standards are defined in the “Validation and Verification Manual”.

<sup>889</sup> Green, 2008, 39.



CERs. Apart from prompting review procedures, they can also file complaints at the EB against the acts of the DOEs.

The position of DOEs as accountees of both the EB and, in a way, of project participants triggers indubitable complexity. The public role of the EB and the private interests of project participants, although not always irreconcilable, may frequently differ. The EB has the duty to ensure that projects result in lower levels of GHGs emissions. The aim of project participants, on the other hand, is ultimately to profit through the issuance of CERs.<sup>890</sup> Their monitoring of DOEs is unlikely to be public-spirited.<sup>891</sup> As for local stakeholders, in turn, the incentives tend to be more apposite for a more diligent oversight of DOEs. International NGOs accredited by the FCCC may also supplement or even act on behalf of local stakeholders in that activity, establishing, in this latter case, a relation of surrogacy.

Lastly, DOEs are also accountable to the specific market founded by the CDM. As in every market, companies compete with their counterparts for consumers of their products or services. Under this perspective, each DOE has to offer an attractive economic package to potential project participants, and its competitors – the other accredited DOEs – have a role in setting such standards. Project participants are free to hire a DOE, and the elements that are taken into account in such choice are also constitutive of an accountability relationship. The plausibility of this accountability dimension, for sure, will hinge upon how competitive that market is. The lesser the number of accredited DOEs from which project participants can choose, the weaker that constraint would be. Monopolistic structures would undoubtedly ruin the plausibility of this accountability dimension.

In a nutshell, to use Keohane's typology, DOEs are mainly entangled in supervisory, market and public reputational accountability forms.<sup>892</sup> One can perhaps rehearse an answer to that descriptive blueprint advanced in chapter 1. Who accounts to whom? In the case of DOEs, they primarily account to the EB, but this relationship is also deeply informed by how DOEs deal with project

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<sup>890</sup> Synthesis Report of the Call for Input on the CDM Policy Dialogue, paragraph 18.

<sup>891</sup> Indeed, Green does confirm that so far there has been no case of this "fire-alarm monitoring". (2008, 50)

<sup>892</sup> Keohane (2002).

participants and local stakeholders and, potentially, with other DOEs themselves. For what and how? DOEs account for their procedures and decisions on validation and verification. When? At any moment of the CDM cycle. On the basis of which standards? On the basis of its obedience to the technical methodologies and procedural requirements. Under pain of what consequences? DOEs might be suspended or even have their accreditation revoked by the EB. They might also, in some cases, simply fail to attract clients to whom they can sell their services. This is what the institutional design of the CDM tells us about how accountable DOEs are expected to be. Looking upstream, DOEs see the presence of the EB, who has the typical powers of a principal. Looking downstream, DOEs are constrained by stakeholders and project participants. Alongside them, they see other DOEs disputing clients. This connection, however weaker, is not just peripheral.

### ***3.2 The Executive Board (EB)***

The place of the EB as an account-holder has been fairly depicted above by way of inquiring how accountable DOEs are supposed to be in accordance with the CDM framework. The EB holds DOEs to account when it accredits, monitors or suspends them, when it decides about the register of a CDM project or about the issuance of the exact number of CERs. The extent to which the EB itself can be held to account, on the other hand, is a crucial complementary step for an overall assessment of the CDM. Again, three angles are indispensable to this analysis: the first regards the relationship of the EB with the COP/MOP, its predominant account-holder; the second refers to the relationship of the EB with the other actors that have a bearing on the CDM: DOEs, project participants and stakeholders; thirdly, market accountability also lurks behind this overall structure, although, in the specific case of the EB, in a slightly different way from the market accountability faced by DOEs.

The CDM, as already described, comprises a set of actors that are mainly governed by the EB. Ultimately, however, the whole system, and the EB itself, is directed by the COP/MOP. The authority the COP/MOP exercises over the EB is being developed through an incremental process. Even without a consolidated comprehensive code, this relationship has been disciplined through

a sequence of decisions and procedural routines that already provide useful guidance. The controlling normative source that disciplines this relationship states that the EB is bound to act “under the authority and guidance of the COP/MOP, and be fully accountable to the COP/MOP”.<sup>893</sup>

The purported “authority and guidance” of the COP/MOP, as inconclusive as it might sound in and of itself, is translated into practice by the recurrent interaction between the two actors. A good example is the way the rules of procedure of the EB were firstly applied in their draft status until they could be officially adopted by the COP/MOP under recommendation of the EB.<sup>894</sup> Moreover, open questions of interpretation have been remitted to the COP/MOP for clarification.<sup>895</sup>

If we look through the lenses of the descriptive coordinates, this constant provision of account by the EB to the COP/MOP<sup>896</sup> reveals that this principal-agent accountability relationship is clearly formal and vertical. It is also direct, unitary, predominantly centripetal<sup>897</sup> and external. With regards to the substance of this interaction, unlike the compliance-based accountability to which DOEs are subject, the terms of engagement between the EB and the COP/MOP are integrity-based. This means that, despite the extensive duty of reporting and recommending decisions to the COP/MOP, the EB has a large measure of discretion when it comes to the substance of its decisions. The EB decision-making routine, in addition, has to obey a set of typical administrative procedural principles like participation and transparency, apart from the increasing burden of reason-giving for its choices. Lastly, although there is no explicit provision about sanctions that the COP/MOP may apply to the EB at

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<sup>893</sup> See 3/CMP.1, Annex, paragraph 5.

<sup>894</sup> The final adoption took place at COP 8 (21/CP.8, paragraph 1, a), and was further amended at COP 9 (18/CP.9, paragraph 1, d) and COP 10 (12/CP.10, paragraph 7).

<sup>895</sup> “The Board agreed that in the event of a question of interpretation arising on decision 17/CP.7 and the CDM modalities and procedures, which the Board is unable to resolve, it would refer the question(s) to the COP or COP/MOP, as appropriate, for further clarification”. (EB 5, Annex 4, paragraph 14).

<sup>896</sup> The enumeration of the functions of the EB, provided by the 3/CMP.1 Annex, paragraph 5, give an idea of its permanent burden of account-giving through recommendations and reports addressed to the COP/MOP.

<sup>897</sup> It is predominantly but not exclusively centripetal because the EB may arguably be accountable not just “as one”. Since the COP/MOP holds the power to appoint the members of the EB, a form of individual constraint may also take place in particular moments. On the balanced composition of the EB, see 3/CMP.1, Annex, paragraph 7. On the way the members of the EB are appointed, see 3/CMP.1, Annex, paragraph 8(a).

discrete points in time, their process of interaction is established in such a way that important choices by the latter can hardly be upheld without either the *ex ante* or *ex post* ratification of the former. An occasional non-ratification of EB's suggested measures can be envisioned as a functional equivalent of sanction.

Second, one should not ignore how the EB might be held accountable to the very same actors that are bound by and bear the impact of the EB's decisions. However counter-intuitive the capacity of actors positioned at the lower end of a vertical authority relationship to hold superiors to account, in cases of complex structures with multiple actors, that might well happen. The duty of the EB to follow settled procedures, to commit with a credible understanding of the principle of transparency and, most of all, to give public reasons that ground its decisions create plausible constraints on decision-making and open avenues for bottom up engagement and participation. In this sense, other actors, apart from the COP/MOP, have ways to monitor, and to some degree embarrass and control, the operations of the EB. This weaker yet non-trivial accountability friction is also supposed to be stimulated by the independent members of the recently instituted policy dialogue panel.

Third, the EB is peculiarly accountable to the market. This is not because it needs to compete, like the DOEs, with counterparts in the search for clients. Rather, it is responsible to convince, in partnership with DOEs, that the whole system of the CDM works in an impartial, non-politicised and independent way. It also has to assure beyond reasonable doubt that CERs are well-founded financial titles, generated according to rigorously constructed and strictly applied methodologies. By withdrawing the confidence and credibility of the CDM, the market may turn marginal or even insignificant this elaborate institutional construction.

To summarise, who accounts to whom? In the case of the EB, it primarily accounts to the COP/MOP, but this relationship is also shaped, however lightly, by how the EB deals with project participants and local stakeholders. Moreover, it has the non-negligible task of developing and protecting, against the market players, the credibility of the whole CDM rationale. For what and how? For its whole set of regulatory tasks. When? At any moment of the CDM cycle. On the basis of which standards? On the basis of the quality of its decision-making procedures and of the soundness of the

methodologies it is supposed to develop. Under pain of what consequences? The EB is closely supervised by the COP/MOP, who can review and rectify its decisions. Other actors, moreover, have formal and informal ways to probe the consistency of the EB behaviour and to expose the whole CDM to a crisis of credibility.

#### **4. Test of appropriateness: which accountability for what institutional purpose?**

The design of the CDM has not been bereft of criticisms. This section reports where exactly these criticisms have targeted and evaluates whether and how the accountability mechanisms that shape the decision-making processes of the EB and DOEs can respond to these challenges. Identifying procedural drawbacks in the system is a necessary step in order to enhance not only its credibility but also the other functions that accountability, in this particular case of the CDM, is supposed to perform.

##### ***4.1 Current criticisms***

Criticisms have explored different fronts of the CDM institutional landscape, from the consistency of CERs to deficiencies concerning its governance structure. The early ones aimed at the environmental soundness of the emissions' reductions stemmed from project activities. It is only possible to know whether a project has achieved lower levels of emissions if one compares it with a baseline scenario. The baseline scenario indicates the estimation of GHGs emissions "that would occur in the absence of the proposed project activity".<sup>898</sup> However, because the baseline scenario is a speculative state-of-affairs, the determination of the actual reduction is a highly controversial matter.<sup>899</sup> It is not difficult to imagine project participants stretching their

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<sup>898</sup> Decision 3/CMP.1, Annex, paragraph 44.

<sup>899</sup> Schneider, 2007, 7.

baseline in order to take the greatest possible financial advantage out of such distortion.<sup>900</sup>

A second type of attack questions whether the CDM projects have had the ability to effectively promote sustainable development in host countries. In an important article, Karen Olsen concludes that the goal of achieving sustainable development is constantly trumped by the monetised goal of the mechanism, *i.e.*, being cost-effective. In concrete terms, and considering that market forces and incentives also shape each CDM project, such a project will be chosen for its capacity to generate cheap emission reductions and not for its sustainable development benefits.<sup>901</sup>

Finally, some authors criticise certain deficient aspects of the CDM decision-making process. They claim that the credibility of the CDM depends on strengthening the administrative law-type rules of the mechanism, such as transparency and review mechanisms, which would still be underdeveloped.<sup>902</sup> The independent evaluation promoted by the members of the policy dialogue also devoted a great deal of energy to analyse and criticise the current governance arrangements of the CDM. At the end, its final report recommended several changes so that the CDM could “become a more accountable and efficient organization” on the whole.<sup>903</sup>

There are two relevant points of dispute as regards to governance matters: the first relates to how transparent the EB is. A common criticism is that the meetings of the EB that decide on specific cases are closed to observers.<sup>904</sup> The second relates to the type of interaction the EB holds with stakeholders. This point can be distinguished into two interrelated criticisms. Many claim that

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<sup>900</sup> Wara exemplifies this situation with the HFC-23 capture projects. The HFC-23 is a by-product of the gas used as refrigerant (HFC-22) and it is considered a very potent and persistent GHG. Developed countries tend to minimise the production of the HCF-23 because it is considered an expensive waste product. Developing countries, on the other hand, with the CDM subsidy, had incentives to increase the production of HFC-23 in order to gain more CERs. (Wara, 2008, 1781-1787)

From 2013, CERs acquired from HFC-23 capture projects are banned from the European Union's Emissions Trading System. (State and Trends of the Carbon Market 2011, Carbon Finance at the World Bank, 10)

<sup>901</sup> Olsen, 2007, 67-71.

<sup>902</sup> Streck and Lin (2008); von Unger and Streck (2009); Meijer (2006-2007).

<sup>903</sup> Report of the High-Level Panel on the CDM Policy Dialogue, Climate Change Carbon Markets and the CDM: A Call to Action, 20012, 3. Apart from a broad governance reform, the policy dialogue recommended that substantial changes should be performed in the CDM design and role.

<sup>904</sup> “Synthesis Report of the call for input on the CDM policy dialogue”, paragraph 11.

comments of local stakeholders have been disregarded or not taken seriously enough.<sup>905</sup> In addition, the decisions of the EB are final and cannot be appealed.<sup>906</sup> Below, I give extra details of these allegations.

The fact that “half of each EB meeting takes place behind closed doors”<sup>907</sup> would, on its face, infringe CDM’s own rules on transparency and openness. In addition, stakeholders believe that it represents a lack of willingness from the EB to effectively engage with them.<sup>908</sup> It seems that the members of the EB keep the meetings closed to public scrutiny because they fear being prosecuted in national courts.<sup>909</sup>

Further criticism has been driven against the device that allows local stakeholders to comment on projects, and the respective obligation of project participants to take due account of them. Some argue that because project participants control this process, they would have incentives to conceal negative opinions and DOEs would be unable to spot such bias. Apart from the inadequate structure of incentives, the fact that the documents dealing with the CDM projects are always in English is also a source of serious concern for they hamper an effective engagement with local stakeholders in places with low percentages of literacy and proficiency in a foreign language.<sup>910</sup>

The prohibition of redress against the decisions of the EB has attracted considerable academic debate as to the character of the relationship that should exist between the EB and project participants,<sup>911</sup> as well as a wave of

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<sup>905</sup> “Synthesis Report of the call for input on the CDM policy dialogue”, paragraph 55.

<sup>906</sup> “Synthesis Report of the call for input on the CDM policy dialogue”, paragraph 13.

<sup>907</sup> Streck and Lin, 2008, 425.

<sup>908</sup> “Synthesis Report of the call for input on the CDM policy dialogue”, paragraph 12.

<sup>909</sup> See Synthesis Report of the call for input on the CDM policy dialogue”, paragraph 11. Actually, the members of the EB are granted “privileges and immunities” whenever they act in their official capacity in meetings convened in Germany as a consequence of the Headquarters Agreement of the secretariat. If the members of the EB convene in other countries, the host country of these meetings should sign a special agreement containing provisions concerning “privileges and immunities”. See “Privileges and Immunities for individuals serving on constituted bodies under the Kyoto Protocol Implementation of Decision 9/CMP.2”, 29 September 2008, FCCC/KP/CMP/2008/10, paragraph 5 (a) and (b). However, as Werksman reminds, these agreements would not protect a member of the EB from being sued in other national courts for her role in a decision of the EB. (Werksman, 2007-2008, 682)

<sup>910</sup> See the “Synthesis Report of the call for input on the CDM policy dialogue”, paragraph 55.

<sup>911</sup> Meijer, for example, invokes the “fundamental right” of access to justice to criticise the fact that the decisions of the EB affecting the rights of private entities remain unchallengeable under the CDM. (2006-2007, 875) Werksman, on the other hand, does not characterise the relationship between the EB and private entities as being grounded on the duties of the former and the rights retained by the latter. To Werksman, in a similar fashion as other domestic offsets schemes, the EB has discretion to “review, withhold and/or invalidate Certified Emissions Reductions (CERs)

disapproval from project participants. The EB received, between 2006 and 2007, twelve letters from private and public legal entities complaining of their financial losses because of the decisions of the EB to reject requests for registration and to issue only a lower portion of the requested CERs. The complainers argued that such decisions lacked consistency, ignored due process and transparency.<sup>912</sup> In 2008, the EB received five more letters from project participants with the same type of concerns. One of the letters suggested that the EB should create a pertinent mechanism of dispute resolution, otherwise that private entity would “initiate judicial proceedings to protect its rights”.<sup>913</sup>

#### ***4.2. Probing the accountability of the Executive Board (EB)***

The CDM is a credit-generative system. If a green project is successful in prompting additionality and hence reducing emissions, it is entitled to be awarded with CERs. CERs are a new type of currency to be traded in an open market.

The concept of “additionality” is key to the logic of the emission reductions scheme embedded in the CDM. Upon the precise gauging of additionality hinges the credibility of the CDM as a market mechanism charged with facilitating emission reductions. The methodology for measuring additionality is the central technical challenge of the EB.

The credibility of the EB, however, does not only depend on being technically effective, but also rests on gathering a positive reputation among its stakeholders, which includes the DOEs, project participants, local stakeholders, and DNAs. That is the message of the independent evaluation promoted by the policy dialogue panel. According to its final report, the CDM, as a sensitive “policy instrument”, would only achieve its purpose if the general public

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prior to and subsequent to their issuance”. (2007-2008, 690) Therefore, instead of property rights, private entities have “legitimate expectations”, and a certain amount of procedural safeguards with regard to CER matters. (Werksman, 2007-2008, 690)

<sup>912</sup> “Privileges and immunities for individuals serving on constituted bodies under the Kyoto Protocol: implementation of decision 9/CMP.2”, 13 November 2007, FCCC/KP/CMP/2007/2, page 5.

<sup>913</sup> “Privileges and Immunities for individuals serving on constituted bodies under the Kyoto Protocol Implementation of Decision 9/CMP.2, 29 September 2008, FCCC/KP/CMP/2008/10, paragraph 9 and 8.



supported its operation and rules.<sup>914</sup> In other words, the report stresses that any global institution, and particularly the CDM, because of its special features, should be more attentive to what chapter 1 called the “populist aspect of accountability” – the ability to sustain public confidence and hence better compliance rates.

The fact that the EB is grossly perceived as an opaque decision-maker only hinders the possibility of securing such populist function of accountability.

In all fairness, however, the EB has been attempting, over the years, to enhance its techniques of interaction with stakeholders. The “call for inputs”, the “communication initiated by stakeholders”, and the “communication of case-specific issues” are tools meant to such end, regardless of how inconsistently implemented they still are.<sup>915</sup>

These tools, if properly put into practice, could arguably also improve the two other functions of accountability: the democratic and the epistemic. The democratic function is fulfilled whenever these mechanisms, primarily but not exclusively the “call for inputs”, give the affected or otherwise interested members of the CDM community, an opportunity to influence the decision-making process. With the public record of the commentaries in the FCCC website, the EB is pushed to take them on board and, consequently, to give reasons for each decision it takes.<sup>916</sup> As explained in chapter 1, the practice of public reason-giving operates in two different ways for stakeholders and the EB. While, for the former, reason-giving is a clear opportunity to air disagreements, to share their views, and to request further reasons, for the second it is an obligation to respond and to justify its actions.

As for the epistemic function, the above mechanisms have the capacity to empower the EB to take better decisions through the provision of valuable information by the stakeholders. The EB has already recognised that certain interactions with stakeholders can be epistemically significant. The 2009 Annual

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<sup>914</sup> Report of the High-Level Panel on the CDM Policy Dialogue, *Climate Change Carbon Markets and the CDM: A Call to Action*, 20012, 56.

<sup>915</sup> As noted by the policy dialogue’s final report (Report of the High-Level Panel on the CDM Policy Dialogue, *Climate Change Carbon Markets and the CDM: A Call to Action*, 20012, 56)

<sup>916</sup> A criticism that could be raised is that such type of constraint on the EB decision-making power is of a different kind or even less stringent than the one seen in domestic administrative agencies, since there is not the judiciary to check on whether and how seriously the commentaries and data were taken into consideration.

Report gives a few examples of such functional expectation. According to this report, the comments of stakeholders can improve the “efficiency and effectiveness” of the EB regarding matters that range from methodologies to operational entities.<sup>917</sup> Yet the EB cannot be truly effective in the performance of its roles unless it manages to put the procedural improvement of an appeal device through.

The creation of such appeal is believed to strengthen the quality of decisions. A second look at the case could correct flawed reasoning, permit a different understanding of the appellant’s claims, or even incorporate better justifications for the same decision. Meijer says that the mere awareness that decisions are to be revised is an incentive for the original decision-making body (in this case, the EB) to think more carefully about its decisions and to justify them accordingly.<sup>918</sup> Esty maintains the same position. Because judicial checks in the international realm is largely lacking, any review mechanism, which Esty calls “power-sharing”,<sup>919</sup> would be essential to detect “analytical errors, and special interest manipulation of the policy process”.<sup>920</sup>

The final report of the policy dialogue drew attention to the accountability-enhancing character of the appeal process:

“Most importantly, this would promote accountability, owed both to entities affected by such rulings and also to the source of delegated power (i.e. the CMP). Other reasons include the need for greater transparency of decision-making, consistency, and predictability, all of which will enhance the legitimacy of the CDM as a whole”.<sup>921</sup>

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<sup>917</sup> Two examples, in particular, reverberate this function: “Paragraph 27: The efficiency and effectiveness of the CDM is facilitated by constructive input from stakeholders. For example, six public calls prompted valuable input from stakeholders, while the submission of comments assisted the Board in its consideration of proposed new methodologies and application of operational entities.” Paragraph 46: “Taking into account the responses to a call for public input on the reasons for some methodologies rarely or never being applied, the Board decided to increase its interaction with project developers when considering methodology submissions, to help ensure usability.” See the 2009 Annual Report of the Executive Board of the clean development mechanism to the Conference of the Parties serving as the meeting of the Parties to the Kyoto Protocol, (November 4<sup>th</sup>, 2009), Doc. n. FCCC/KP/CMP/2009/16.

<sup>918</sup> Meijer, 2006-2007, 918.

<sup>919</sup> Esty, 2005-2006, 1534.

<sup>920</sup> Esty, 2005-2006, 1536.

<sup>921</sup> Report of the High-Level Panel on the CDM Policy Dialogue, Climate Change Carbon Markets and the CDM: A Call to Action, 20012, 59.

In addition to the appeal process, the final report of the policy dialogue recommended the creation of a “grievance” mechanism, which should be used by any local stakeholder affected by CDM projects.<sup>922</sup> The reason for implementing the grievance mechanism is twofold: it could reputedly solve early problems of CDM projects and also have a deterrent effect on the use of the appeal process.

The EB occupies a central and strategic position in the operation of the CDM. In the end, the EB will not only be assessed for its technical capacity to deal with methodologies and baselines but also for the means through which it handles its decision-making process and interacts with stakeholders. Calls for more transparency, consistency, and accessibility will still be heard if the EB does not manage to implement these goals. These calls clearly reverberate the whole set of GAL principles.

#### ***4.3 Probing the accountability of the Designated Operational Entities (DOEs)***

Jessica Green was the first author to test the effectiveness of the control exercised by the EB over DOEs. She analysed 752 projects submitted to registration between 2004 and 2007, and examined how often and why the EB has questioned DOEs’ recommendations.<sup>923</sup> In overall, Green’s conclusion is ambivalent. On the one hand, the author recognises that there are accountability mechanisms that seem to be working in practice. On the other, however, she acknowledges some factors that may hinder an effective control over DOEs.

On the positive side, the oversight function of the EB was well praised. The EB triggered reviews and eventually rejected projects that raised doubts with regard to their additionality. This fact indicates that the EB has been using its oversight powers, and, in this exercise, tends to be more concerned with substantial problems than with minor or distractive procedural issues.<sup>924</sup>

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<sup>922</sup> Report of the High-Level Panel on the CDM Policy Dialogue, Climate Change Carbon Markets and the CDM: A Call to Action, 20012, 59.

<sup>923</sup> Green, 2008, 44.

<sup>924</sup> Green, 2008, 45 and 47.

On the negative side, she worries that the small number of accredited DOEs increases the chances of monopoly within the sector.<sup>925</sup> Her study shows that only three DOEs are responsible to validate 84,7% of the projects, and that these companies also control 84% of the verification market. As a result, these three DOEs have ended up validating or verifying each others' projects.<sup>926</sup> In addition, she believes that the large number of incoming projects may challenge the capacity of the EB to maintain an in-depth examination of each project.<sup>927</sup>

At the time of her writing, however, there were still a small number of accredited DOEs (only 18 in comparison to 58 at the moment).<sup>928</sup> This fact does not necessarily mean that concerns with respect to monopolistic behaviour are solved. It might be a sign that the number of accredited DOEs had to keep up with the increasing number of new CDM projects. One cannot deny, however, that there is an instrumental value in the plurality of DOEs. It increases market competition and, as Green recognises, avoids "incentives for reciprocity" among them.<sup>929</sup>

The empirical questions of whether the EB is materially equipped to be an effective account-holder, or of whether the DOEs are in sufficient number and adequately placed in order to eliminate any conflict of interest, are outside my scope. It would obviously be a revealing research endeavour to empirically assess the working order of these accountability structures.

In any case, there is an understanding that the highly technical work assigned to DOEs can only be effectively assessed if stronger standards are available.<sup>930</sup> The recently enacted "Validation and Verification Manual", in 2010, which aims at standardising the conduct of DOEs and also indicates the benchmark through which their acts can be judged is a step closer to this end.

Apart from the standards against which DOEs' output are assessed, we have seen that the ways in which DOEs are appointed, monitored, appraised and

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<sup>925</sup> "A small number of firms lower competition among them, and the importance of maintaining reputation to ensure business." (Green, 2008, 50)

<sup>926</sup> Green, 2008, 47 and 49.

<sup>927</sup> Green, 2008, 50.

<sup>928</sup> Green, 2008, 34 and 52. The current list of DOEs is available online.

<sup>929</sup> Green, 2008, 36.

<sup>930</sup> Report of the High-Level Panel on the CDM Policy Dialogue, Climate Change Carbon Markets and the CDM: A Call to Action, 20012, 63. The request for developing tougher standards for DOEs' performance was done in accordance with a study prepared in 2009, therefore, before the "Manual" was enacted in 2010.

sanctioned are disciplined by a consolidated set of procedures. That is how it should be if one wants to select entities more capable to perform the functions of validation of complex projects, verification and certification of the promised emission reductions, and of requests to issuance the equivalent amount of CERs.

## 5. Conclusion

From the beginning, the CDM was a vow of many expectations. The hope was to attract and steer finance towards the challenges prompted by climate change, to engage developing countries into a low-carbon path of development, and finally, to allow developed countries to achieve their emission targets in a cheaper way. Many promises turned out to be reality. Particularly, this market has been praised for having included developing countries, together with developed countries, in the fight against climate change.<sup>931</sup> However distinct the role and responsibilities between developed and developing countries remain, the latter actors have turned into more than mere recipients of foreign aid.

The CDM has already displayed impressive numbers, in spite of the fact that interests in such global carbon market have considerably receded due to the low ambition of states' mitigation pledges.<sup>932</sup> The first CDM project was registered in 2004. As of May 2012, the EB registered 4.000 projects, from 74 countries, and issued 900 million CERs to 1.500 projects.<sup>933</sup> According to a 2010 World Bank Report about Development and Climate Change, the international carbon market, instituted by the CDM, has mobilised around \$95 billion in clean energy investment from 2002 to 2008.<sup>934</sup>

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<sup>931</sup> Wara, 2008, 1763-1764.

<sup>932</sup> Because of this fact the first measure recommended by the policy dialogue is to strengthen the ambition of states' pledges so to restore demands in carbon transactions. See Report of the High-Level Panel on the CDM Policy Dialogue, *Climate Change Carbon Markets and the CDM: A Call to Action*, 20012, 3.

<sup>933</sup> "CDM reaches milestone: 4000th registered project", Bonn, April 2012.

<sup>934</sup> "World Development Report 2010: Development and Climate Change", Chapter 6, "Generating the Funding Needed for Mitigation and Adaptation", 262. This same Report, however, states that such figure might still be considered insufficient if it is compared with the numbers that are estimated to start tackling climate related problems in developing countries. The figures range from \$140 to \$175 billion/year by 2030 for mitigation purposes and \$30 to \$100 billion/year for adaptation. *Id.*, 259. A more recent Report explains that the carbon market growth has been suffering from the lack of clarity in the climate change negotiations. *State and Trends of the Carbon Market 2011*, Carbon Finance at the World Bank, (Washington, DC, June 2011), 9.

If one wants to know how accountable DOEs and the EB have actually been, only an extensive empirical inquiry would be able to respond. There are, nevertheless, growing claims of unaccountable behaviour on the specific part of the EB. As the main governing body of the CDM, the EB has authority to affect projects and, hence, those who participate in such global carbon market. It is not surprising, therefore, that the EB is exposed to a closer scrutiny as to how it exercises its powers. When looking through these lenses, we can see the EB as an opaque decision-maker, which, oftentimes, may overlook stakeholders' interests.

A different sort of question is how accountable the EB should be. GAL's principles shed lights on a possible answer to such query. The incremental reforms vis-à-vis the criticisms, which includes the policy dialogues' final report, are already directed towards enhancing the administrative law-type mechanisms of the system. Although the EB has become more accountable throughout time, a stronger accountability package is still in need to respond to ongoing challenges, one that is able to instil more transparency, a consistent implementation of the tools that promote stakeholders' participation in different processes, and, finally, the creation of an appeal procedure against the EB's decisions.

The success of this global carbon market is dependent on the ability of the CDM to adapt itself and quickly respond to the supposedly flaws of the system. In the case of the CDM, this means to reinforce the democratic, epistemic and populist functions of accountability.

## Concluding remarks

### *Taking stock*

International law has been a laboratory of intense institutional experimentation in the last few decades. The almost exclusive grounding upon which it used to be justified – a consent-based principal-agent delegation from nation states – has failed to fully meet the coordination demands that chief global concerns call for.<sup>935</sup> Yet, no matter how much sovereignty has been attenuated and how much the power of transnational decision-making sites has concomitantly been thickened, a sense of fragility and impotence lingers on. To a large extent, coordination is still hampered by sovereignty.<sup>936</sup>

Innovative arrangements, at the same time, have also sparked a sense of legitimacy crisis.<sup>937</sup> The greater the decision-making autonomy of transnational bodies have turned out to be, the more pressing the demands for a renovated legitimacy discourse have become. A hands-on response to this sense of crisis has recently been pushing for greater *accountability* of those transnational institutions that give rise to such anxiety.

This is where the thesis departs from. Such point of departure, in itself, is not an original one. In the field of international law scholarship, the last twenty years or so have witnessed the publication of a plethora of studies, from the more theoretical to the rather empirically-driven, addressing similar concerns in a wide range of subject-areas that pervade global governance. The concept of accountability, thus, is the cornerstone of a respectable portion of current discussion on the prospects of legitimate and effective global governance. It would be instrumental, in other words, for a more robust justification of transnational authority.

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<sup>935</sup> Boyle, 1993, 95.

<sup>936</sup> Henkin describes this situation: “We have had some cooperation, but it has been limited in the name of sovereignty. We pursue a quest for world order, but a limited world order. We created a United Nations, but it is a limited United Nations. We have a World Bank and an International Monetary Fund and other specialized agencies, and they are all limited, not only in achievement but even in aspiration, by a persistent addiction to this notion of sovereignty”. (1999, 3)

<sup>937</sup> This is a sense of crisis that applies, as contended by Weiler, not only to the “new layer” (regulation), but also to the previous ones (transactionalism and community). (2004, 561)

The meaning of accountability, however, cannot be taken for granted. Common usages denote quite distinct concepts and intend to apply to very diverse contexts. Quite often, moreover, the term becomes hostage to strategic rhetorical trends. For this very reason, this thesis has dedicated its first chapter to a preliminary conceptual work that attempted to delimit what political accountability means. Its second chapter, in turn, has offered a systematisation of what *desirable* political accountability minimally entails according to some of the most influential legitimacy discourses and normative manifestos.

The concept of accountability here stipulated was a minimalist one, that is, comprehensive enough to grasp different sorts of power relations. I did not claim this was the one and only right definition of the term, but it nonetheless illuminates accountability facets of a broader spectrum of transnational institutions than a maximalist concept would otherwise do. As chapter 1 has demonstrated, that stipulated concept somewhat strays from the more commonsensical usages of the term, but it resonates with the approach adopted by a significant literature upon which I draw.<sup>938</sup>

The more minimalist the definition, again, the larger its denotative range naturally becomes. At the transnational level, to avoid “overloading the definition of accountability”<sup>939</sup> may be cognitively productive to perceive more nuanced interactions that shape accountability relationships, no matter how attractive they may be from the normative point of view.

To be sure, one cannot overlook or underrate other fundamental distinctions, like the one between institutional and non-institutional forms of accountability, to produce a compelling analysis.<sup>940</sup> The finer distinctions that an all-embracing definition occasionally fails to spot would then need to be developed through further qualifications. The descriptive coordinates of accountability, developed by chapter 1, have hopefully provided valid and powerful analytical angles to inform and flesh out those further qualifications.

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<sup>938</sup> Central in this literature are the arguments of Keohane, Mashaw and Philp.

<sup>939</sup> Philp maintains: “avoiding overloading the definition of accountability, should alert us to the multiple ways in which international organisations and their members are, in fact, accountable”. (2009, 46)

<sup>940</sup> As Barros has insightfully argued: “it is important to draw out the difference between material and political constraints and institutional limits because references to the former may lead readers to erroneously think that limited authoritarianism is relatively unproblematic.” (2004, 27)



### *What is new? Conventional questions, transitional answers*

If one plans to go beyond description, as the political discourse and the literature in law and international relations have actually gone, how should one couch the demands for accountability? And what are the implications, if any, of the different ways through which the demands for accountability are couched?

At the domestic level, the abstract answer to these questions is fairly consolidated and almost consensual. Constitutional democracy, however varied and controversial its practical translation might be from the normative and historical points of view, conveys an insuperable legitimating symbol for a state-based political community nowadays.

At the global level, such a virtually unanimous normative response is hardly available. Chapter 2 has echoed an extensive literature in search for a new baseline of legitimacy in that sphere. This new baseline needs to grant feasibility considerations a relevant weight when devising proposals for institutional reforms. The prescription of an institutional design beyond the state involves different theoretical bets about what the plurality of transnational entities should look like (and about the likelihood, in the shorter or longer terms, of those cherished transformations to eventuate).

The choice of the specific normative flag that will carry our most cherished normative ambitions is no gratuitous sloganeering. The labels are bound to traditions of legal thought and institutional experiences which constrain the plausibility and persuasiveness of uttering each signifier.

The factual assumption about the “demise of the state-centric ‘Westphalian’ order”, as Krisch has phrased the phenomenon, triggers the normative question of how to “come to terms with the resulting new order.”<sup>941</sup> The Global Administrative Law (GAL) project offers one way to do that, however self-consciously limited such a way is. The GAL project tries to portray an accountability story from micro-procedural features that moulds the “global administrative space” – the growing administrative dimension (quasi-legislative and quasi-judicial) of international regimes, as chapter 2 has explained in more detail.

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<sup>941</sup> Krisch, 2010, 245. Earlier, in a similar line, Rosenau had already claimed that there is a bifurcation between a “state-centric world” and a “multi-centric world”. (2001, 355)

If the overall goal of accountability is to promote “public responsible behavior”,<sup>942</sup> the GAL project proposes to chase that goal through intra-institutional procedural devices *writ small*. This is crucial to understand, for some, the reputedly seductive feature of GAL project’s analytical framework: it provides transitional answers to more permanent questions. This inherent provisionality and non-sufficiency signals a candidly stated incremental strategy for improving and legitimating the institutions of global governance.

***Between “pure instrumentality” and “normative modesty”: the limits of GAL***

The GAL programme consists in a step-by-step route for accountability-building in institutions of global governance. As Krisch reminds, “proceeding in small steps, with limited ambition, may be the only sensible option”.<sup>943</sup> The project itself, therefore, does not promise an overhaul legitimation of international institutions through that rather small set of procedural devices *writ small*. Its expectation has never been so ostentatious.

A question remains, however, about the nature of GAL’s normative propositions. In other words, there is some disagreement about how neutral GAL’s normative propositions actually are or can consistently be. MacDonald, for example, understands GAL as “purely instrumental”.<sup>944</sup> Thanks to its fundamental ambivalence and versatility, GAL “can be flexed and adapted in thoroughly inappropriate – not to mention unethical – ways.”<sup>945</sup> In the words of MacDonald and Shamir-Borer, GAL “can, for the most part, only be as ‘good’ as the ends it is intended to serve, be they constitutional, democratic, rights-based or, indeed, efficiency-enhancing.”<sup>946</sup> In sum, GAL can be “harnessed to any end”.<sup>947</sup>

GAL project would be basically oriented towards due process, something that Mashaw, when elaborating on the relationship between administrative law and institutional design, defined as a “straightforward, instrumentally rational, quasi-

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<sup>942</sup> Mashaw, 2006, 123

<sup>943</sup> Krisch, 2010, 265.

<sup>944</sup> MacDonald claims: “Global administrative law, unlike global constitutionalism, functions as pure instrumentality.” (2008, 24)

<sup>945</sup> MacDonald and Shamir Borer, 2008, 55

<sup>946</sup> MacDonald and Shamir-Borer, 2008, 53.

<sup>947</sup> MacDonald, 2008, 25.

engineering process”,<sup>948</sup> a tool that attempts to mould behaviour in the direction of our normative commitments whatever they may be. The goals, therefore, would remain external to the GAL project itself: rather than constitutive of the project, the goals would be contingent features to which procedural tools might be attached.

For GAL advocates, *democracy* is perhaps too strong a word through which to judge the institutions that populate the international arena. *Accountability* would sound as a more achievable target in the current stage of international relations. It would be a second-best option for better governance while the first-best remains untenable and counter-productive in the foreseeable future.

However, once we recognize that the claim for accountability, *per se*, is normatively empty, as chapter 1 has strived to contend, is there any political ideal sneaking behind GAL project’s proposals? Can it really be just about a thin and managerial idea of efficient and responsive administration? Can it retain any appeal if so radically conceived as pure instrumentality?

MacDonald and Shamir-Borer have hinted at a tentative answer: “it would be naïve and misleading to suggest that global administrative law does not presuppose some values of its own: the desirability of accountability, participation, transparency, even the rule of law itself – these are all normative questions, the answer to which is simply assumed within the global administrative law project.”<sup>949</sup>

They seem to suggest that GAL is either something more than sheer instrumentality, or there would be no good reason to embrace its cause, however pragmatically modest this cause might be.<sup>950</sup> One would not be able to argue, therefore, for the superiority of one form of accountability over another regardless from a normative theory. And in order to take a stand on what GAL is being used for, we need some substantive value to come on board. Vindicating a value of such kind is a condition to keep the normative appeal of the whole project.

If pressed to justify, then, GAL proponents can’t help but excavate deeper normative premises. Apodictic statements about the desirability of participation, transparency or reason-giving will not do, for they cannot be self-standing by justificatory fiat. GAL project, thus, would better disclose its normative alliances and speak out. It cannot ignore larger ideals, however controversial it is to define them

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<sup>948</sup> Mashaw, 2006, 152.

<sup>949</sup> MacDonald and Shamir-Borer, 2008, 53. See also Krisch (2006).

<sup>950</sup> For the idea of “pragmatic modesty”, see Krisch (2010).

and, at the same time, to identify what the next institutional step should be within a gradualist strategy of procedural reform. Otherwise, it remains a manipulable and hence unreliable cause to be endorsed. That does not entail losing the virtues of modesty and incrementality. In order to judge whether an institution deserves any political energy, that line between ultimate aims and recipe for immediate action should be drawn somewhere.

Pursuing normative modesty, therefore, does not need to go as far as to make GAL ‘purely instrumental’. That would probably weaken rather than strengthen the whole project. A more convincing reading of the GAL project may see it as an attempt to carve common ground from the bottom-up and to agree on a normative level-playing field from where to assess and criticise currently existing decision-making processes and structures.

### ***Tailoring fit-for-purpose accountability arrangements: the three works-in-progress of the Climate Change Regime***

This thesis has chosen three particular transnational bodies within the Climate Change Regime in order to describe and probe their accountability structures. My exercise was informed by the analytical framework assembled by chapters 1 and 2. The reason for choosing the three bodies was the very distinct yet indispensable roles they play within such a regime: structuring the science-policy dialogue without compromising the integrity of the former (IPCC); facilitating compliance of developed countries with emissions targets established by the Kyoto Protocol (CCKP); incentivising financial cooperation between developed and developing countries for the construction of climate-friendly projects (CDM).

Holding each of these bodies to account, one might expect, would require tailor-made accountability structures according to the respective purpose of the institution. And, as a matter of fact, the analysis has unsurprisingly shown that each of the three bodies is accountable in a specific way. I did not intend, for sure, to recycle the relevant but unremarkable claim according to which international institutions are inevitably accountable one way or another.<sup>951</sup>

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<sup>951</sup> Krisch, 2010, 259-260.

Procedural peculiarities aside, however, the ethos of procedural reforms recommended to or actually undertaken by the three bodies over the last years have been oriented towards strikingly similar goals. As chapters 4, 5 and 6 depict, reforms have all been permeated by, among other things, convergent expectations of transparency, public justification, participation, representation and revisability. Such principles have become, moreover, official rhetoric of a large variety of transnational bodies.

Approaching GAL as a mere reverberation of commonplace fashionable principles, however, would be unfairly reductionist. The GAL project should not be conceived as a free-floating list of accountability-enhancing devices that guide a mechanical box-ticking test. It checks, instead, the extent to which there is an intramural manifestation of those well-regarded and deep procedural values. It removes internal procedures from the comfortable zone of invisibility, where powerful interests may rule without much constraint or embarrassment.

The three bodies very much remain as institutional works-in-progress that have been reacting to a common trend of external pressure. Its internal reforms were more or less distinctive instantiations of that same set of procedural principles. The three bodies do fairly meet, in sum, the normative recommendations of the GAL project. But what sort of achievement is that, if at all?

The GAL project, indeed, does not go as far as to question the very point of each institution itself, or how it fits the fragmented power network of global governance and international relations. The GAL project rather invites, first and foremost, institutional introspection. Therefore, the contextualised question of whether these specific models of accountability are appropriate and sufficient, which this thesis has tentatively raised at last, cannot fully be answered by resorting to the GAL framework.

Why, then, resort to the GAL framework for examining the accountability structures of the three institutions? There are two important considerations that help answering this question. First, despite its limited reach, the GAL framework is able to capture one crucial dimension of legitimate accountability of transnational institutions in general, and also essential for climate change bodies in particular: its procedural lenses, specially the demands for participation and representation, can already diagnose and criticise the occasional mismatch between, on the one hand, the decision-makers, and, on the other, the decision-takers or affected communities

generally conceived.<sup>952</sup> The “problem of disregard”, as explained by Stewart, is part of the GAL’s agenda.<sup>953</sup>

Second, the GAL framework was not the single analytical resource of this thesis. It was actually preceded by a complementary framework that attempted to cast light on the interconnected *functions* of accountability that undergird each procedural *archetype* and the tensions or inevitable trade-offs that pervade the task of institutional design.

The thesis has scrutinised particular institutions that have not yet been thoroughly considered by the literature in international environmental law. It was an intra-sectoral investigation rather than an inter-sectoral comparison. But apart from that, it has also attempted to make a conceptual contribution to the ways of thinking about accountability. Distinguishing the descriptive from the normative question, and, additionally, identifying the several levels in which the normative question itself can be raised, is a decisive methodological premise for any research of this sort.

A full test of appropriateness, or an exact detection of what the pending challenges to these three accountability experiences are, would certainly involve a far more ambitious inquiry than the one I was able to take up. However, checking the relationship between the general institutional purpose, the expected accountability functions and their translation through procedural devices is an enlightening starting point. This supplement, I believe, can aid the conclusions so far reached by the already numerous ‘case-studies branch’ of the GAL project’s literature (as opposed to the ‘foundational’ or ‘conceptual and taxonomical’ branch).<sup>954</sup> Therefore, rather than a celebratory or apologetic account of the GAL project, the thesis has tried to identify what type of insights may spring from it.

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<sup>952</sup> Keohane and Grant (2005) have called it the “external” or participation dimension of accountability in transnational institutions, as opposed to the “internal” or delegation dimension.

<sup>953</sup> Stewart (2011).

<sup>954</sup> According to Kingsbury and Stewart, “more than 100 papers mapping and analyzing these phenomena have now been written under the auspices of the project.” (2008, 2)

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